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February 25, 2008

Brent Hunsberger
The Oregonian
1320 S.W. Broadway
Portland, OR 97201

Re: Petition for Public Records Disclosure Order
University of Oregon and *Oregon State University*

Dear Mr. Hunsberger:

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 an email with the petition attached on February 6, 2008. The petition asks the Attorney General to direct Oregon State University (OSU) and the University of Oregon (UO) to make available information pertaining to the amount of money the Universities' athletic departments receive from their respective media and marketing agreements. On February 13, 2008, we received an email with an addendum to the petition.[1] In the addendum, you identified circumstances that had developed since the original petition and assert that those events support your petition. For the reasons that follow, we deny your petition.

1. Background

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. If a public record contains exempt and nonexempt material, the public body generally must separate the materials and make the nonexempt material available for examination. ORS 192.505.

2. Your petition

Your petition pertains to redactions from three records.

[1] We appreciate your extending the time within which the law would otherwise have obligated us to issue an order to February 25, 2008.

Learfield Agreement. OSU provided you, without redaction, 27 pages of a 28 page agreement between the State of Oregon and Learfield Communications, Inc. (Learfield). Subject to the terms and conditions set out in the agreement, the state granted Learfield certain exclusive rights and privileges as to marketing, promotion, and broadcast of OSU athletic events. In exchange, Learfield agreed to pay OSU sums specified in the agreement.

Paragraph 17.01 of the Learfield agreement requires OSU to provide Learfield with "a minimum of" certain numbers of home athletic season admission tickets for football and men's basketball games. OSU did not redact any part of paragraph 17.01.

OSU redacted information from page nine of the Learfield agreement. OSU also provided you with two amendments to the Learfield agreement. As to one of the amendments, OSU redacted certain information. Copies of each of the pages from which OSU redacted information are attached to this order and labeled OSU-9, OSU-A1 and OSU-A2. From each of these pages, OSU redacted the amount Learfield agreed to pay.

ERT Agreement. The UO provided you, without redaction, seven pages of an 11 page agreement executed in 2004 between the State of Oregon and ESPN Regional Television, Inc. ("ERT" as described in the agreement). Subject to the terms and conditions set out in the agreement, the state granted ERT certain exclusive rights to market intercollegiate athletic programs of the UO. In exchange, ERT agreed to pay the UO sums specified on pages six and seven of the ERT agreement.

The UO redacted information from pages six, seven, eight and nine of the ERT agreement. Copies of each of the pages from which the UO redacted information are attached to this order and labeled UO-6, UO-7, UO-8 and UO-9. In contrast to the disclosure made by OSU as to paragraph 17.01 of the Learfield agreement, the UO redacted from UO-6 the number of season football, men's and women's basketball and track and field tickets it agreed to provide ERT. From UO-7, the UO redacted the amount ERT agreed to pay.

In its original response to your request, the UO redacted from UO-8 and UO-9 all of paragraph 17. Paragraph 17 established a time-limited window, designated the "negotiating period," within which the UO and ERT agreed that they would negotiate exclusively with one another. The negotiating period is now closed. After consultation with this office, the UO agreed to disclose most of paragraph 17, saving only the lengths of time allowed for actions within the exclusive negotiation mechanism. UO-8 and UO-9 are the redacted version of paragraph 17.

OSN Agreement. The UO provided you, without redaction, seven pages of an 11 page agreement executed in 2007 between the State of Oregon and Collegiate Sports Marketing, dba Oregon Sports Network, Inc. (OSN). Subject to the terms and conditions set out in the agreement, the state granted OSN certain exclusive rights to market intercollegiate athletic programs of the UO. In exchange, OSN agreed to pay the UO sums specified on pages six and seven of the OSN agreement.

The UO redacted information from pages six, seven, eight and nine of the OSN agreement. Copies of each of the pages from which the UO redacted information are attached to this order and labeled UO/OSN-6, UO/OSN-7, UO/OSN-8 and UO/OSN-9. As it did with respect to the agreement between the state and ERT, the UO redacted from UO/OSN-6 the number of season football, men's and women's basketball and track and field tickets it agreed to provide OSN. From UO/OSN-7, the UO redacted the amount OSN agreed to pay.

In its original response to your request, the UO redacted from UO/OSN-8 and UO/OSN-9 all of paragraph 17. Paragraph 17 established a time-limited window, designated the "negotiating period," within which the UO and OSN agreed that they would negotiate exclusively with one another. The negotiating period is now closed. After consultation with this office, the UO agreed to disclose most of paragraph 17, saving only the lengths of time allowed for actions within the exclusive negotiation mechanism. UO/OSN-8 and UO/OSN-9 are the redacted version of paragraph 17.

In your petition, you assert that the University of Arizona and University of California have disclosed information similar to that redacted by OSU from the Learfield agreement and by the UO on UO-7 and UO/OSN-7. You subsequently provided copies of agreements between the University of Arizona, University of California, and Washington State University and their respective contractors. In these documents, information similar to that redacted by OSU from the Learfield agreement and by the UO on UO-7 and UO/OSN-7 is displayed.

The UO and OSU assert that the information they redacted is exempt from compelled disclosure under ORS 192.501(2). You assert that the UO and OSU have not established that the exemption applies.

This dispute requires us first to analyze whether the redacted information is a "trade secret." ORS 192.501(2). To the extent the redacted information is within the definition of "trade secret," then ORS 192.501 requires that we determine whether "the public interest requires disclosure in the particular instance."

3. Scope of the "trade secrets" exemption

Our analysis begins with the proposition that "every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.420(1).

> Under the statutory scheme, disclosure is the rule. Exemptions from disclosure are to be narrowly construed. *See Jordan v. MVD*, 308 Or 433, 438-39 (1989). The legislative history of the relevant statutes shows that the legislature intended that they be applied simply, quickly and with a large measure of uniformity. *See Pace Consultants v. Roberts*, 297 Or 590, 594, (1984); *Ayers v. Lee Enterprises Inc.*, 277 Or 527, 531-34, (1977); *Sadler v. Oregon State Bar*, 275 Or 279 (1976); *MacEwan v. Holm et al*, 226 Or 27 (1961). In construing the scope of ORS 192.205(2), we keep in mind that we are

> considering an exception to the general rule favoring disclosure. *Jordan v. MVD*, supra, 308 Or at 439.

Guard Pub. Co. v. Lane County School Dist. No. 4J, 310 Or 32, 37 (1990).

Two broad classes of exemptions exist in the Public Records Law. "All of the exemptions in the first category are *conditional;* they exempt certain types of information from disclosure 'unless the public interest requires disclosure in the particular instance.'" ATTORNEY GENERAL'S PUBLIC RECORDS MANUAL ("MANUAL") at 25 – 26 (2008) (Citing and quoting ORS 192.501). We see no textual basis in any statute for concluding that ORS 192.501(2) is immunized from the balancing test made universally applicable by ORS 192.501 to each of its subsections. Exemptions enumerated in ORS 192.502 are not, in contrast, universally conditioned on a case-by-case, redaction-by-redaction balancing of the public disclosure interests against the public's interest in favor of confidentiality.

The UO and OSU assert that all of the redactions are justified by the conditional exemption set forth in ORS 192.501(2). The exemption provides:

> "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), ORS 646.461 to 646.475, defines "trade secret" differently. ORS 646.461(4) provides, for purposes of the UTSA, that:

> "Trade secret" means information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique or process that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to the public or to other person who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

If a public body's disclosure of a trade secret would constitute "misappropriation" under the UTSA, disclosure would be prohibited under that act and the records would be exempt from disclosure under the exemption provided in ORS 192.502(9) (exempting public bodies from the obligation to disclose records that statutes require the agency to keep confidential). In this case, neither the UO nor OSU asserted that any of the redactions were justified by ORS 192.502(9).[2]

[2] The UTSA also provides immunity from a claim or action for misappropriation in cases where the information is released under an order issued under the Public Records Law or is released on advice of counsel. ORS 646.473(3).

The text of ORS 192.501(2) also partially overlaps with definitions of "trade secrets" created by the courts for the purpose of shaping protective orders under ORCP 36C and its federal counterpart, FRCP 26(c).

> Courts traditionally examine six factors in determining whether information constitutes a trade secret: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to safeguard the secrecy of the information; (4) the value of the information to the business or its competitors; (5) the amount of effort or money expended by the business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Citizens' Util. Bd. v. Oregon Pub. Util. Comm'n, 128 Or App 650, 658-659 (1994).

Given that the UO and OSU relied on ORS 192.501(2) in denying your request, we rely primarily on that statute to determine the validity of the redactions. In the analysis below, we occasionally refer to the definitions provided in the UTSA and by the courts as secondary support for our conclusions.

4. Application of the "trade secrets" exemption to the redactions

a. Amounts to be paid to the UO and OSU (exhibits OSU-9, OSU-A1, OSU-A2, UO-7, and UO/OSN-7)

For the reasons described below, we conclude that the redacted amounts are "trade secrets" as defined in ORS 192.501(2).

The redacted information satisfies the first condition required for application of the exemption because it "is not patented." ORS 192.501(2). Based on representations made to us by both institutions, the redacted information also satisfies the second condition because the amounts paid the universities pursuant to the three contracts are "known only to certain individuals within" the UO and OSU. *Id.*

We previously have concluded that pricing information can be a trade secret. In 1989 we concluded that certain fee schedules and price lists submitted to the Oregon Health Sciences University (OHSU) in response to a request for proposals were protected trade secrets. Public Records Order, December 7, 1989, Baldwin. In 1987 we concluded that a list of prices for medical services provided by OHSU pursuant to a contract with Blue Cross and Blue Shield of Oregon were protected trade secrets. Public Records Order, December 30, 1987, O'Neill. Similarly, we conclude here that the amount paid in exchange for exclusive marketing rights is information used by the contractors and the universities for business purposes, satisfying yet another of the requirements of ORS 192.501(2).

The remaining questions under ORS 192.501(2) are whether each redaction has "actual or potential commercial value, and [gives] its user an opportunity to obtain a business advantage

over competitors who do not know or use it." The corresponding component of the definition of "trade secrets" applicable to the UTSA is whether the confidentiality of the information creates "independent economic value." And, for purposes of crafting protective orders, the courts have described this element as requiring an evaluation of the "the ease or difficulty with which the information could be properly acquired or duplicated by others." Applying these considerations, we conclude that UO and OSU maintain business advantages by keeping confidential the information redacted from OSU-9, OSU-A1, OSU-A2, UO-7 and UO/OSN-7.

Competition exists for contracts of the kind from which the UO and OSU redacted the information at issue here. This is evident from the fact that materials you submitted to us identified six different entities that provide or have provided similar sports marketing services to five universities.[3] The state has an economic interest in maximizing payments made to its universities pursuant to sports marketing contracts. We accept the Universities' representations that disclosure of the information redacted from OSU-9, OSU-A1, OSU-A2, UO-7 and UO/OSN-7 would undermine the state's interest in maximizing payments. Those representations are consistent with the commonsense proposition that information concerning the amount paid has independent economic value. In the absence of disclosure by the UO or OSU, competitors would likely have difficulty determining the amount either institution had agreed to accept for sports marketing services. In sum, would-be contractors who know exactly what the UO or OSU agreed to accept in the past might offer less than they otherwise would have offered.

You suggest that it is significant that other universities have chosen not to assert trade secrets exemptions. To the same end, you assert that the Universities' claims are undermined by the UO's voluntary disclosure of information like that redacted from OSU-9, OSU-A1, OSU-A2, UO-7 and UO/OSN-7 in a February 12, 2008 press release. The release included electronic links to images of counterpart original letters of intent executed by the UO and Collegiate Sports Properties LLC, dba Oregon Sports Network (OSN/IMG). The letters of intent stated the UO and OSN/IMG's mutual intent to negotiate a sports marketing agreement.

We assume that the maximum potential value of a marketing agreement with the UO, OSU, or any other institution sponsoring intercollegiate athletic teams necessarily depends in part on the characteristics of each institution and of their respective athletic programs. Potential contractors may value differently the offerings of each institution, and, therefore, the judgments made by each institution about release of trade secrets illustrate nothing about the authority of a different institution to make a different choice about the disclosure of information of the same character. Thus, we do not find legally significant the fact that different institutions chose not to assert a trade secrets exemption for information akin to that redacted from OSU-9, OSU-A1, OSU-A2, UO-7 and UO/OSN-7.

Nor does the press release undermine the state's legal claim that disclosure of OSU-9, OSU-A1, OSU-A2, UO-7 and UO/OSN-7 would damage its economic interests. Your position would be correct if the released information was the same as the redacted records. In that case,

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[3] You provided copies of agreements between the Regents of the University of California and International Sports Properties, Inc., between Washington State University and Fox Sports Net Northwest, LLC., and between the University of Arizona and Host Communications, Inc.

the lack of reasonable steps to protect the information would preclude characterizing the information as a trade secret. But the information released was not the same as the information redacted from OSU-9, OSU-A1, OSU-A2, UO-7 and UO/OSN-7. The released information expresses the UO and OSN/IMG's intent to enter into an agreement effective immediately, but the information redacted from OSU-9, OSU-A1, OSU-A2, UO-7 and UO/OSN-7 is not disclosed in the release or the counterpart original letters of intent. Moreover, a public entity is free to disclose a public record even if the agency could lawfully claim an exemption. Here, the UO and OSN/IMG did just that, issuing a joint public announcement of their intent to negotiate a marketing agreement with OSN/IMG.

b. Number of season tickets (exhibits UO-6, UO/OSN-6)

The UO informs us that it interprets its obligation to provide season tickets to be part of the overall agreement. Each season ticket is considered by the UO to carry with it a value equal to its sale price. According to the UO, the value of the ticket formed part of the price that the UO and its contractors negotiated for the total agreement. Therefore, the information redacted from UO-6 and UO/OSN-6 is a "trade secret" for the same reasons that OSU-9, OSU-A1, OSU-A2, UO-7 and UO/OSN-7 are trade secrets.

You suggest that the fact that OSU disclosed its obligation to provide Learfield with "a minimum of" certain numbers of home athletic season admission tickets for football and men's basketball games undermines the UO's assertion that the information redacted from UO-6 and UO/OSN-6 is a "trade secret." We disagree. As noted above, a public agency is free to disclose a public record even if the agency could lawfully claim an exemption. The fact that one agency chooses to disclose information while another chooses to assert an exemption does not undermine the latter's claim of exemption.

c. First Negotiation/First Refusal (exhibits UO-8, UO-9, UO/OSN-8, UO/OSN-9).

The UO has released[4] to you paragraph 17 of its agreements with ERT and OSN. The UO redacted the length of time it negotiated for various steps in the exclusive dealing period established by paragraph 17. We conclude that these redactions are supported by the same rationale that supports redaction of the negotiated payments and, as to the UO, the number of season tickets provided.

5. Does the public interest require disclosure?

We recently reconciled the prohibition against release of "trade secrets" as defined in the UTSA with the premise that ORS 192.501(2) is to be construed in light of the fact that "disclosure is the rule" under the Public Records Law.

[4] The UO informed us on February 25, 2008 that it would send you the pages labeled UO-8, UO-9, UO/OSN-8, and UO/OSN-9.

> 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, the Attorney General believes 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.

Public Records Order, August 8, 2007, Kirsch; MANUAL at 35 (2008).

In your petition, you correctly state that the public has an interest in monitoring the sources of the Universities' revenue and their public funds expenditures. In general, the public has a significant interest in knowing the terms by which public entities agree to sell or otherwise dispose of public assets. We further agree that the purpose of the requested disclosure is to give the public access to this information, and that ordering disclosure would serve the public's interest in that regard. Overall, however, we do not agree that the public interest in disclosure outweighs the public interest in nondisclosure.

Three factors cause us to conclude that the public interest in maintaining the confidentiality of the redacted information outweighs the public interest in compelling its disclosure.

First, as noted in the Public Records Order excerpted above, some degree of public interest in keeping confidential the redacted information necessarily is implied by the conclusion that the redacted information is a "trade secret" as defined in ORS 192.501(2). Although the conclusion that the redacted information is a "trade secret" is not conclusive as to the balancing required by 192.501, the conclusion is nevertheless significant in that balancing.

Second, as noted above, the public has an interest in maximizing the economic value derived from its intercollegiate athletic programs. For the reasons described above, disclosure would disserve that interest.

Third, the public has an interest in maximizing revenue from contractual relationships beyond the confines of intercollegiate activities. According to information received from the UO, for example, only 13% of its revenue in state fiscal year 2006 came from money appropriated by the Legislature, while 52% of its revenue came from other activities, including but not limited to, athletics contracts, agreements with food service providers such as soft drink companies, licensing agreements, and technology transfer agreements. Many of these agreements will arise in the context of negotiations between the UO and private entities that will have alternatives other than dealing with the UO. In such negotiations, the UO's negotiators will be at a disadvantage if they cannot offer would-be contractors protection for "trade secrets" as defined in ORS 192.501(2).

6. Conclusion

We conclude that the information redacted from the attachments satisfies the requirements of ORS 192.501(2). We do not find that the public interest in disclosure of this information outweighs the public interest in nondisclosure. Therefore, the information is exempt from disclosure under ORS 192.501(2).

For the reasons stated above, we respectfully deny your petition.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS21272
c: Melinda Grier
Meg Reeves

Attachments:
OSU-9
OSU-A1
OSU-A2
UO-6
UO-7
UO-8
UO-9
UO/OSN-6
UO/OSN-7
UO/OSN-8
UO/OSN-9