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March 11, 2013

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Re: Petition for Public Records Disclosure Order:
Oregon Business Development Department (OBDD)
DOJ File No. 123301-GA0017-13

Dear Ms. Meiffren and Mr. Grove,

This letter is the Attorney General's order in response to Ms. Meiffren's petition asking our office to direct OBDD to disclose certain public records to her. Specifically, Ms. Meiffren is seeking annual employment reports submitted by recipients of property tax abatements to demonstrate compliance with the job creation obligations they have undertaken in exchange for their receipt of financial incentives. On behalf of OBDD, Mr. Grove effectively denied Ms. Meiffren's request for these materials, stating that "the bulk of the information contained in these reports is indeed proprietary, such as trade secrets, job/wage information and other information that if made public would benefit a company's competition." Mr. Grove cited "ORS 192.501" as the basis for this determination. Ms. Meiffren's petition followed. In response to Ms. Meiffren's petition, OBDD offered ORS 285C.615(4) and (5) as further grounds in support of its denial of her request. For the reasons explained below, we grant Ms. Meiffren's petition and order OBDD to disclose the requested information.

The Oregon Public Records Law, ORS 192.410 to 192.505, provides that "[e]very 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). Exemptions from disclosure are construed narrowly, meaning that "if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails." *Colby v. Gunson*, 224 Or 666, 676 (2008). A public body that asserts a statutory exemption from disclosure has the burden of demonstrating that the law permits the material in question to be withheld from public disclosure. ORS 192.450(1); ORS 192.490(1).

OBDD effectively advances two theories in support of its denial of Ms. Meiffren's request. First, OBDD argues that ORS 285C.615(4) and (5) permit this information to be withheld. Those provisions are specific to the reports submitted to OBDD under the property tax abatement incentive program:

> (4) Information collected under this section may be used by the department to make aggregate figures and analyses of activity under the strategic investment program publicly available.
> (5) Specific data concerning the financial performance of individual firms collected under this section is exempt from public disclosure * * *.

Second, OBDD cites ORS 192.501(2) in support of its denial of Ms. Meiffren's request. That provision conditionally exempts "trade secrets" from disclosure:

> "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.

We consider each of OBDD's assertions in turn.

OBDD's position with respect to ORS 285C.615 comprises two distinct arguments. First, OBDD argues that the language of subsection (4), which explicitly authorizes OBDD to "make aggregate figures and analyses of activity under the strategic investment program publicly available," implies that OBDD may not disclose non-aggregated information about specific firms. Although this implication is a reasonable one, Oregon's Public Records law requires disclosure "except as otherwise *expressly* provided" by statute. ORS 192.420(1) (emphasis added). The Oregon Court of Appeals has explained that exemptions do not arise by implication:

> [D]efendant's assertion that [a statutory provision] creates an implied exemption from disclosure under the Public Records Law is inconsistent with the way Oregon courts construe that law and determine the scope of the exemptions from

> disclosure. * * * The underlying policy of the Public Records Law favors the disclosure of public records. Oregon has a "strong and enduring policy that public records and governmental activities be open to the public." * * * Consistently with this policy, ORS 192.420(1) creates a broad right to inspect public records " except as otherwise expressly provided by ORS 192.501 to 192.505." That means that exemptions from disclosure must be "expressly" stated in the law. ORS 192.420(1) forbids giving effect to any implicit and broader meaning of a statutory exemption from disclosure under ORS 192.501 to 192.505 than what the statute "expressly" allows. That is no less true when the statutory exemption incorporates other statutes * * *. Only the "express" effect of those statutes, as well, is relevant to the exemption analysis under ORS 192.420(1).

Colby, 224 Or App at 675. Although OBDD's inference may be a sensible one, the Public Records Law simply does not recognize exemptions based on such inferences.

OBDD also argues that the information falls within the scope of the express exemption codified at ORS 285C.615(5). To asses this contention, we ask whether the information is "data concerning the financial performance of individual firms." In making this determination, we are mindful of the narrow construction rule requiring us to give effect to any "plausible construction of [the] statute favoring disclosure" of the requested records. *Colby*, 224 Or App at 676. As we now explain, we think that it is plausible – and indeed, more in keeping with common usage – to interpret "data concerning * * * financial performance" to mean information about a firm's overall profitability, rather than the highly specific information appearing on these reports.

For example, the annual 10K report Intel Corp. (which filed one of the reports at issue) submitted to the SEC contains extensive information about the company's financial performance. http://www.sec.gov/Archives/edgar/data/50863/000119312513065416/d424446d10k.htm#toc424446_10. The report includes information about Intel's income, revenues and margins, and information about its assets, alongside cost information split into very broad categories. The information presented in that report permits a reviewer to evaluate Intel's financial performance. Intel's third quarter report for 2012 is similarly detailed. http://files.shareholder.com/downloads/INTC/2355179235x0x605849/bf8bc94b-41a4-4f29-8696-ddb0fa7c55e3/INTC_12Q3_Earnings_Release.pdf. We think that the common understanding of "data concerning * * * financial performance" encompasses this sort of information that meaningfully illuminates a company's overall financial performance.

We do not think that most people would consider the limited data on this form as "financial performance" data. For example, if a client asked for "data concerning the financial performance of Intel" and his broker provided only the reports withheld by OBDD, the client would likely feel that his request had been bizarrely misunderstood. And the client would likely be unhappy, because the reports withheld by OBDD simply do not contain information that can be meaningfully applied to evaluate Intel's overall financial performance. They contain information about labor costs. But information about a single type of cost does not constitute data concering performance.

The dictionary definitions of the relevant terms are consistent with our understanding. "Data" means "factual information (such as measurements or statistics) used as a basis for reasoning, discussion, or calculation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, (Unabridged, 2013 web edition), accessed March 8, 2013. "Concerning" means "relating to" and is synonymous with "regarding, respecting, about." *Id.* "Financial" means "relating to finance or financiers" *Id.*; "finance," in turn means "the pecuniary affairs or resources of a * * * company, or individual." *Id.* "Performance" means "the manner of reacting to various stimuli," as in "the performance of the stock market." *Id.* Putting these definitions together, the statutory exemption appears to apply to something like this:

> Factual information (such as measurements or statistics) that can be used as a basis for reasoning, discussion, or calculation relating to the ways in which individual firms' pecuniary affairs are reacting to [business] stimuli.

This is consistent with what we regard as the ordinary understanding of the statutory phrase.

Our interpretation also gives meaning to the legislatively-adopted phrase "financial performance." *See* ORS 174.010 ("where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all"). This phrase appears for the first time in subsection (5). We assume that the legislature chose that phrase specifically in delimiting the scope of the exemption. OBDD's interpretation would essentially have us treat the exemption as though it read "information submitted by individual firms under this section is exempt from public disclosure." In other words, OBDD asks us to assume that, when the legislature first used the specific phrase "data concerning * * * financial performance, it was describing the same information it had earlier described in significantly different terms. Our more natural interpretation gives specific effect to the particular legislatively-adopted phrase.

OBDD notes that none of the *specific* information that is statutorily required comports with our understanding of "financial performance" data. Therefore, argues OBDD, we should understand the exemption differently, in order to give it some effect. But OBDD overlooks the fact that, in addition to the specific information that the statute requires, companies are required to submit "[a]ny other information required by [OBDD]." ORS 285C.615(2)(f). We have no difficulty imagining that the legislature thought that OBDD might want to require companies to submit financial performance data. Among other things, such data could help evaluate whether jobs created under the incentive program are likely to last beyond the tax abatement. The exemption as we have interpreted it would make such information exempt from disclosure. *See, Colby*, 224 Or App at 674 (noting that the court's narrow construction of a statute purportedly creating an exemption did not make the statute a nullity, despite the public body's argument to the contrary).

In contrast to the Intel financial reports discussed above, the information requested by OSPIRG consists of property tax data and specific information about the number and average wages of employees associated with particular projects that have qualified for income tax abatements. Those numbers simply do not constitute data about the "financial performance" of

the individual firms. Although we acknowledge that information about the compensation costs associated with a particular project will have *some* bearing on a company's financial performance, we do not think that it would be consistent with common usage or with the "narrow construction" rule to hold that this information is "data concerning * * * financial performance.

We turn to OBDD's contention that the information is exempt under the "trade secrets" exemption of ORS 192.501(2). Unlike the provisions of ORS 285C.615, this exemption is "conditional" in that it applies "unless the public interest requires disclosure in the particular instance." ORS 192.501. The ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2010) (MANUAL) explains the "somewhat complex" relationship between this conditional exemption and the Uniform Trade Secrets Act, codified at ORS 676.461 to 676.475:

> When it adopted the UTSA, the Oregon legislature included a provision immunizing public bodies from misappropriation claims. * * * This provision indicates that the legislature expected that disclosures under the Public Records Law might include information otherwise protected as a trade secret. The legislature chose to address that possibility by giving public bodies immunity against any resulting misappropriation claims. Notably, the legislature did not amend the existing conditional exemption for trade secrets. Moreover, at the time the UTSA was adopted, the Public Records Law did not contain a "catchall" exemption. Instead, the Public Records Law included an enumerated list of specific statutes providing for some type of confidentiality. The legislature did not add the UTSA statutes to that list. Oregon Laws 1987 ch 537 (enacting UTSA). We therefore conclude that, in adopting the UTSA, the legislature did not intend to make trade secrets unconditionally exempt from disclosure under the Public Records Law. * * *[However], we look to the UTSA, and to cases construing the UTSA, for guidance with respect to whether information is or is not a "trade secret" under the Public Records Law.

MANUAL at 35.

Among other limitations, the UTSA definition of "trade secrets" requires "efforts that are reasonable under the circumstances to maintain * * * secrecy." ORS 646.461(4)(b). In this case, OBDD provided us with more than 20 sets of records responsive to Ms. Meiffren's request. Within each set of records is an OBDD form that includes a check box which submitters could check to indicate a request for confidential treatment. On all but 3 of forms, the submitters did not check this box. As to the submissions on which the confidentiality box was not checked, we conclude that the information in question cannot be a trade secret. Succinctly, by failing to take the simple step of checking an available box before submitting information to a public body, the submitters failed to make reasonable efforts to maintain the secrecy of the information.

We turn to the remaining three sets of materials. In two of those cases, the submitters requested that OBDD treat as confidential information about the number of jobs

created, and about the taxable income and overall compensation of those employees. In the remaining case, the submitter requested that OBDD treat as confidential the number of a contractor's employees working at the location. Regardless of whether that information may qualify trade secrets, we conclude that there is a strong public interest in its disclosure here. As Ms. Meiffren's petition notes, the entities submitting this information have received property tax abatements under a program designed to create jobs. *See* ORS 285C.603 ("a significant purpose of the strategic investment program established in ORS 285C.600 to 285C.626 and 307.123 is to improve employment * * *.") The incentives represent a sizeable public investment in that outcome, and the public has a correspondingly sizeable interest in ascertaining the extent to which its investment is paying off. Aligned to that interest is a likewise significant pulic interest in its ability to oversee the work of public officials by assessing the incentives that those officials are extending to businesses, and the extent to which those incentives reflect a wise investment of public assets.

Balanced against those public interests favoring disclosure, we perceive only an attenuated possibility that disclosure could actually harm the commercial interests of the submitters who requested confidentiality. That interest is attenuated in part because the information in question does not associate particular wages with particular employees or positions. The information consists of overall averages, and of specific averages for "the most common occupations" at the location. Those occupations are not identified. Moreover, current – and former – employees in those "common" occupations presumably have a good idea what the wages are. Factors like these probably explain why so few submitters requested that OBDD treat the submitted information as confidential.

As a policy matter, OBDD argues that disclosure of this information will be harmful to the competitive positions of all of the firms in question. The fact that so few of them asked OBDD to treat this information confidentially seems to belie that argument. But even if OBDD is correct that some competitive disadvantage may result, the sizeable tax incentives extended to these businesses represent a publicly-funded competitive *advantage* to each of them. We perceive no basis to conclude that potential harms of disclosure would outweigh that direct fiscal advantage to the businesesses, much less outweigh the significant public interests served by disclosure.

For the foregoing reasons, Ms. Meiffren's petition is granted. We order OBDD to disclose to Ms. Meiffren the material she requested. OBDD has seven days within which to comply or announce its intention to institute legal proceedings. ORS 192.450.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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