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November 8, 2010

Brent Walth
The Oregonian
1320 SW Broadwaay
Portland, OR 97201

Re: Petition for Public Records Disclosure Order:
Oregon State Lottery Records

Dear Mr. Walth:

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. Your petition seeks disclosure of records you requested from the Oregon State Lottery ("Lottery"). In an email to Lottery dated May 19, 2010, you sought "sales reports, compiled and/or collected as part of the Lottery's enforcement of its Casino Prohibition rules * * * regarding these lottery retailers: Lighthouse Delis Nos. 1,2,3,4,5,6, and 7" (collectively "Lighthouse Deli" or "vendor").
You report that you subsequently narrowed the request to the annual total of "miscellaneous non-lottery sales" reported on vendor's "Gross Sales Report" forms, as well as "a description of those sales." The Lottery denied your request by letter dated August 9 and signed by Mary Loftin, Lottery's Public Affairs Manager.

The Oregon Public Records Law, ORS 192.410 to 192.505, confers upon any person the right to inspect any public records of a public body in Oregon, subject to express exemptions. ORS 192.420(1). A public body asserting an exemption bears the burden of sustaining its action on appeal to the Attorney General or the courts. ORS 192.450(1); ORS 192.490(1). For the reasons that follow, we deny your petition.

Analysis

Our analysis begins with the proposition 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). Lottery asserts that the information requested by Mr. Walth is exempt under ORS 192.501(2), conditionally exempting from compelled disclosure

> 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.

This exemption is conditional in that it applies "unless the public interest requires disclosure in the particular instance." ORS 192.501.[1] To evaluate Lottery's claim of exemption, we must determine whether the information sought is a "trade secret," and, if so, whether the public interest nevertheless requires disclosure.

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[1] In addition to the public records laws, Oregon law addresses trade secrets in the Uniform Trade Secrets Act (UTSA), ORS 646.461(4), which prohibits "misappropriation" of trade secrets as defined in that act. We have recently concluded that even if a public body's disclosure of a trade secret would constitute "misappropriation" under the Uniform Trade Secrets Act, that does not mean that the records would be exempt under the 'catch-all' exemption of ORS 192.502(9):

> When it adopted the UTSA, the Oregon legislature included a provision immunizing public bodies from misappropriation claims. To qualify for this immunity, the disclosure must be made pursuant to an order issued under the Public Records Law or on the advice of an attorney authorized to advise the public body. ORS 646.473(3). 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.
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> However, we believe that by retaining the conditional exemption for trade secrets when it enacted the UTSA, the legislature acknowledged a public interest in the non-disclosure of trade secrets. As a result, we believe it is appropriate to give heightened scrutiny to contentions that the public interest requires the disclosure of trade secrets.

ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2010), § I.E.4.c.(2), http://www.doj.state.or.us/public_records/manual/public_records.shtml#e4c2.

I. Trade Secrets

The definition provided by ORS 192.501(2) identifies five characteristics of a trade secret:

1. it consists of a "formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented";
2. it is "known only to certain individuals within an organization";
3. it is "used in a business" conducted by the organization;
4. it has "actual or potential commercial value"; and
5. it "gives its user a business advantage over competitors who do not know or use it."

In addition to considering the definition of "trade secrets" under ORS 192.501(2), 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. We note that ORS 192.501(2) does not purport to absolutely delineate trade secrets. Instead, the exemption describes what trade secrets "may include, but are not limited to." MANUAL § I.E.4.c.(2).

As the Oregon Court of Appeals has recently emphasized, a trade secret is "one of the most elusive and difficult concepts in the law to define." *Kaib's Roving R.PH. Agency v. Smith*, 237 Or App 96, 103 (2010) (citations omitted). The determination can depend heavily on the specific circumstances. In another case concerning trade secrets, the Oregon Court of Appeals observed that courts traditionally examine six factors in determining whether information is 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 acquired or duplicated by others.

Citizen's Utility Board of Oregon v. Oregon Public Utility Commission, 128 Or App 650, 658-59 (1994).

The first kind of information requested here, "miscellaneous non-lottery sales," is one of three categories that comprises the total "non-lottery sales" on Lottery's report form. The other two categories are "food" and "alcohol." The second kind of information requested is the description of the specific kinds of products and total sales making up the "miscellaneous" category.

We conclude that the information is a trade secret. We begin with the factors specifically identified in ORS 192.501(2). First, the information appears to be a compilation of sales figures that are not patented. Second, Michael Mills, attorney for Lighthouse Deli, informs us that the information is known only to certain individuals within the organization. Though the information is also known to Lottery officials, their knowledge is derived from the compulsion imposed upon Lighthouse Deli to provide the information for Lottery to use in performing its regulatory oversight. Third, Mr. Mills similarly asserts that the information is used in the business, specifically "to forecast, to plan for future sales and purchases, to track customer preferences and trends, and to design products types and mix that will allow my client to meet required non lottery sales percentages." This explanation also explains why the requested information "has actual or potential commercial value" and "gives a business advantage over those who do not know it." Because all five characteristics of a trade secret under ORS 192.501(2) are present, we need not examine the traditional factors relied upon by courts.

You argue that the information is not a trade secret because Lottery has previously disclosed information of this kind. However, the fact that Lottery may have disclosed similar information does not mean the information is not a trade secret of the business from which the information is derived. Moreover, Marcia Hutchins, Retail Contract Manager at the Lottery, informs us that the correspondence provided with your petition was inadvertently not redacted. Ms. Hutchins states that Lottery normally redacts this sales information when disclosing Lottery sales information. A previous inadvertent disclosure by Lottery does not prevent information of this kind from being a trade secret.

II. Public Interest in Disclosure

Having concluded that the requested information is a trade secret, we must consider whether the public interest nevertheless requires disclosure. We apply "heightened scrutiny" to your contention that the public interest requires disclosure of this trade secret information. MANUAL § I.E.4.c.(2). In denying the public records request, the Oregon Lottery concluded that the public interest favored non-disclosure because making public the information could "put at risk Lottery's ability to attract and retain qualified retailers which in turn puts at risk the Lottery's ability to sell its products and ultimately interferes with the Lottery's statutory responsibility to produce the maximum amount of net revenues to benefit the public purpose."

You contend that disclosure of the information you seek would serve the public interest because it would allow the public to evaluate whether Lottery is requiring its vendors to operate consistent with the constitutional prohibition against casinos. We agree that the public has such an interest. As you note, however, the Lottery already makes public the total "non-Lottery" sales data, which provides a rough basis for the public to evaluate Lottery's enforcement of its casino rule. OAR 177-040-0061. Of course, whether an establishment is or is not a casino usually does not depend strictly on sales numbers. And it does not appear that disclosing more specific information about the sales breakdown will be particularly revealing with respect to whether an establishment is a casino.

You also suggest that release of the figures would aid the public's interest in evaluating enforcement of the "convenience store rule," OAR 177-040-0017. The breakdown of "non-Lottery" sales is used to allow the Lottery to make an initial determination as to whether the products sold may be of the kind that are consumed off premises, in which case the Lottery may investigate further. The breakdown itself does not generally provide enough information for Lottery to know whether the rule is being violated, but instead triggers further investigation. Accordingly, release of the information would not necessarily allow the public to evaluate Lottery's enforcement efforts. You note that you are particularly interested in cigarette sales, as cigarettes can no longer be consumed inside these establishments since the passage of the Indoor Clear Air Act. We agree that information regarding cigarette sales in particular would provide some ability for the public to evaluate Lottery's enforcement efforts. But we do not believe that public interest is sufficient to overcome the heightened scrutiny applicable to claims that disclosure of trade secrets serves the public interest.

Conclusion

For the reasons described above, we conclude that information you request is a trade secret. And we conclude that the public interests favoring disclosure you identify are insufficient to overcome the heightened scrutiny applicable to claims that the public interest requires disclosure of trade secrets. Consistent with those conclusions, we respectfully deny your petition.

Sincerely,



MARY H. WILLIAMS
Deputy Attorney General

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c: Mary Loftin, Oregon State Lottery Commission
Michael Mills, Mills Jacobson Halliday, PC