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April 26, 2010

Rachel Bachman, Sports Enterprise Reporter
The Oregonian
1320 SW Broadway
Portland, OR 97201

Doug Park, Assistant General Counsel
Office of the General Counsel
1226 University of Oregon
Eugene, OR 97403

Re: Public Records Disclosure Order:
University of Oregon Records

Dear Ms. Bachman and Mr. Park:

On March 29, 2010, we received Ms. Bachman's petition seeking an order under the Oregon Public Records Law, ORS 192.410 to 192.505.[1] Ms. Bachman asks that we require the University of Oregon (UO) to disclose to her, in unredacted form, an agreement between UO and Nike USA, Inc. (Nike) pertaining to Nike's use of UO's athletic programs for marketing purposes. UO had previously disclosed the contracts to Ms. Bachman, but only after redacting certain information from the contracts. Specifically, UO redacted information showing the consideration Nike agreed to pay in exchange for the rights conferred by UO. That consideration is comprised of (1) a "mutually determined product supply package" with a "retail value" agreed upon for each year; (2) "Nike Product for personal use" that can be ordered by UO and "select members of the Athletic Department" up to a certain "retail value" each year; and (3) "base compensation" payable by Nike to UO in a certain amount each year. UO claims that the redacted information is a "trade secret" and exempt from disclosure under ORS 192.501(2). We conclude that the redacted compensation is not exempt from disclosure, and consequently order UO to disclose the agreements to Ms. Bachman in unredacted form.

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). It is undisputed that the contract at issue is a public

[1] We thank Ms. Bachman for allowing us until April 26, 2010 to issue this order.

record. UO asserts that its redactions are expressly permitted by 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.

Our office has previously stated that ""If a public body's disclosure of a trade secret would constitute 'misappropriation' under the Uniform Trade Secrets Act [(UTSA)], disclosure would be prohibited under that act and the records would be exempt under the 'catch-all' exemption of ORS 192.502(9)." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) at 35. If we were to adhere to that analysis, we would also need to examine whether the information redacted by UO is unconditionally exempt from disclosure. However, we no longer believe that analysis is correct.

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.

In a previous Public Records Order we concluded that amounts paid by UO and Oregon State University under various media and marketing contracts were exempt under ORS 192.501(2). Public Records Order, February 25, 2008, Hunsberger (Hunsberger). We overrule that previous order to the extent that it is inconsistent with this order.

We do not explore whether the information requested qualifies as a trade secret, or whether Hunsberger was correctly decided in that regard. Regardless of whether the requested

information could qualify as a trade secret, we conclude that the public interest requires disclosure of the price at which UO agreed to confer the various marketing rights to Nike. It follows that the redacted information is not exempt.

Before this agreement was made, the marketing rights in question were UO's rights. UO could hold or sell those rights as it deemed appropriate. UO chose to confer the rights on Nike, a private entity. The redacted information shows what compensation UO agreed to receive in return. If UO officials could keep secret the bottom-line prices at which the rights were sold, the public would have no way of evaluating whether those prices were reflective of the value of the assets. This, in turn, would significantly impede the public's ability to evaluate the wisdom and prudence of the officials entrusted with the operation of the agency. And it would make it far more difficult for the public to be alert to the possibility that public assets are being sold for inappropriate private benefit, either of public officials or of private parties.[2]

In Hunsberger, we expressed a number of ways in which maintaining the secrecy of the contract price might serve the public interest. One of two conclusive considerations was that disclosure would "disserve" the public interest in "maximizing the economic value derived from its intercollegiate athletic programs." Hunsberger at 8. That determination was based on speculation that "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." Hunsberger at 6. On the other hand, it is as easy to speculate about ways in which disclosure would increase the economic value derived from such contracts. For example, disclosure might lead competitors into a bidding war. We conclude that the interest recognized in Hunsberger is merely speculative and we are not persuaded that it is sufficient to overcome the concrete public interest in knowing the price at which state agencies are selling their assets.

In this regard, we note that information about similar contracts entered into by other universities appears to be readily available. Using Google, www.google.com, our office was able to quickly find specific information about the compensation the following NCAA Division I universities are receiving in exchange for conferring similar rights on Nike or its competitors:

- University of Washington
- University of California, Los Angeles
- University of Memphis
- University of Connecticut
- University of North Carolina
- University of Wisconsin
- University of Michigan

[2] We note that part of the consideration received by UO consists of the right to order Nike products "for personal use" by "select members of the Athletic Department." It will likely be easier for the public to evaluate the appropriateness of that consideration if the public has access to information showing the overall compensation paid by Nike and the amount of that overall compensation that can be dedicated to the "personal use" of "select" UO employees.

- University of Texas
- University of Kansas
- University of Nebraska
- University of Georgia
- Auburn University
- Kansas State University

In no way was our search exhaustive. The search also turned up past information about compensation received by universities. Comparing the past information to the current information, it is difficult to conclude that the public interest would be harmed by disclosure. For example, it appears that the University of Michigan went from a seven-year deal with Nike worth $1.2 million in cash and just over $3 million total per year, to an eight-year deal with adidas worth $3.8 million in cash and $7.5 million total per year. Indeed, UO itself has previously disclosed how much it was receiving under its agreement with Nike through 2008-2009. UO has not argued to us that the prior disclosure resulted in a lower price when the agreement was recently amended and extended.

The second conclusive consideration in Hunsberger was that "the public has an interest in maximizing revenue from contractual relationships beyond the confines of intercollegiate athletics." Hunsberger at 8. This is actually the same consideration, applied more generally. The notion that disclosure of the requested information will negatively affect public contracting prices in other contexts is, if anything, more speculative than the notion that disclosure will negatively affect contract prices for the same or similar assets. At least in the context of the sports-licensing agreement at issue here, the speculative interests supporting nondisclosure are outweighed by the concrete interests supporting disclosure.[3]

In short, we conclude that the amounts redacted by UO are not exempt from disclosure because, even if they could be regarded as trade secrets, the public interest requires their disclosure. Although it is not dispositive, we observe that this conclusion conforms to decisions in other jurisdictions. For example, the United States Department of Justice appears to believe that prices paid under government contracts must be public. *See* http://www.justice.gov/oip/foia_updates/Vol_II_2/page6.htm. In an order dated August 5, 2009, the Texas Attorney General's office similarly concluded that the price in a contract between a public body and a private entity was subject to compelled disclosure. http://www.oag.state.tx.us/opinions/openrecords/50abbott/orl/2009/pdf/OR200910860.pdf. Indeed, in researching this order, we were unable to find a single instance in which a court

[3] In addition to these considerations, we observed in Hunsberger that "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)." We noted, however, that this was not the conclusive consideration. Hunsberger at 8. The reason is obvious: if the determination that material constitutes a "trade secret" established conclusively that the public interest favors nondisclosure, then the ORS 192.501(2) exemption would be effectively removed from the public interest balancing that is required under ORS 192.501.

determined that the price at which a public body's asset was sold to a private entity could be withheld from public disclosure.[4]

For the foregoing reasons, Ms. Bachman's petition is granted. UO is hereby ordered to disclose to Ms. Bachman an unredacted version of the contract she requested. UO has seven days within which to comply or announce its intention to seek review. ORS 192.450(2).

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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[4] Our research did reveal cases in which *unit* prices *paid by* the government were determined to be exempt from disclosure under the federal Freedom of Information Act. Even in those cases, the overall contract price was disclosed. *See **McDonnell Douglas Corp. v. Air Force***, 375 F.3d 1182 (DC Circuit, 2004) ("some of the requested information must be disclosed, including the bottom-line price for the base year of the contract."); ***Honeywell v. N.A.S.A.***, Nos. 76-353, 76-377 (D.D.C. 1976) (unpublished opinion), discussed at http://www.justice.gov/oip/foia_updates/Vol_II_2/page6.htm.