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March 26, 2010

Les Zaitz
Ted Sickinger
The Oregonian
1320 S.W. Broadway
Portland, OR 97201-3499

Re: Petition for Public Records Disclosure Order:
Montauk TriGuard Travel Expense Records

Dear Mr. Zaitz and Mr. Sickinger:

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, which we received on March 12, 2010, asks the Attorney General to direct the Investment Division of the Oregon State Treasury ("OST") to provide "records of travel expenses incurred by Montauk TriGuard for state investment officer John Hershey's attendance at the firm's annual meeting in California beginning Sept. 24, 2009." For the reasons that follow, we respectfully deny your petition.[1]

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. Custodians of public records are required to make those records available for inspection or copying unless the records are exempted from disclosure by statute. ORS 192.430(1). A custodian is "a public body mandated, directly or indirectly, to create, maintain, care for or control a public record." ORS 192.410(1). A public record, in turn, is any writing relating to the conduct of the public's business that is "prepared, owned, used or retained by" a public body. ORS 192.410(4). If the travel expense records you requested are public records in OST's custody, OST is required to provide an opportunity to inspect the records unless they are exempt from disclosure.

We understand that OST has provided you with other records and information relating to travel by OST personnel in the past several years. That includes a significant amount of information about Mr. Hershey's travel to California. For example, you have received documents indicating that Mr. Hershey traveled from Portland to Orange County, California on September 24, 2009, flying on Alaska Airlines flight 586 and sitting in seat 23A; that Mr. Hershey stayed one night at the Westin South Coast Plaza in Costa Mesa, California; and that Mr. Hershey flew back to Portland on September 25, 2010 on Alaska Airlines flight 583, sitting

[1] We appreciate your having granted a one-week extension of the time in which we would ordinarily have been required to issue this order.

in seat 22C. You have also received more generic information about travel by OST employees, including some information that OST synthesized from various records to be more responsive to your requests. We do not understand you to assert that OST has withheld any information in its possession pertaining to Mr. Hershey's travel, and OST confirms that it has not. Therefore, the question presented by your petition is whether records held by a private equity general partner that show how much money was expended by that general partner to pay for travel by an Oregon state employee conducting state business are public records subject to disclosure under Oregon's Public Records Law.

As noted above, a public record is a document that relates to the conduct of the public business and is "prepared, owned, used or retained by" a public body. Travel by a public employee representing the state's interest at a meeting pertaining to an investment overseen by the State Treasurer is the public's business, and the expense records you requested clearly relate to that travel. If the records are "prepared, owned, used or retained" by a public body, then they are public records. You do not argue that the records were prepared by OST or that they are retained by OST. In fact, you note in your petition that the records are "in the possession of Montauk [TriGuard and] were not prepared or produced directly by OST."

However, you offer two arguments in support of your view that the records are public records. First, you argue that OST "owns" the records. You base this argument first on OST's position as a limited partner in Montauk TriGuard Funds III and IV. You also assert that OST has a contractual right to inspect and copy the records, and thus owns them. Second, you argue that OST has, "in fact, 'used'" these records to arrange for and report upon Mr. Hershey's travel. You also argue that, to fulfill administrative mandates concerning travel and travel reporting, OST must access the requested expense records.

We cannot conclude that OST owns the records. Under applicable Delaware partnership law, a partnership is an entity distinct from the partners. 15 Del. C. §201. Property acquired by the partnership is the property of the partnership. 15 Del. C. § 203. "Unless otherwise provided in a statement of partnership existence or a statement of qualification and in a partnership agreement, a partner is not a co-owner of partnership property and has no interest in specific partnership property." 15 Del. C. § 501. Although OST does have some right to access records of the partnership, a right to access records is not, by itself, tantamount to ownership of the records. A contract permitting one entity to inspect records owned by a distinct entity does not, in itself, confer ownership of the records to another entity. Such access is not comparable to contractual provisions that confer ownership of work created through performance on a public body. *Compare* ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) at 7 (a contract term conferring ownership means that a public body owns the records conferred).

Nor can we conclude that OST has used the records. OST states that it has not used or reviewed any records showing the cost of Mr. Hershey's travel. Your petition recites a number of ways in which you believe OST has used the information, and you provided us with a number of records you received from OST that you claim document this use. The records that you are requesting are records that would show the cost to Montauk TriGuard of Mr. Hershey's travel. None of the documents that you provided to us actually indicate that OST has used records showing that cost. The records show that OST was aware of the dates and times of Mr. Hershey's travel arrangements, his flight and seat numbers, the name and location of the hotel,

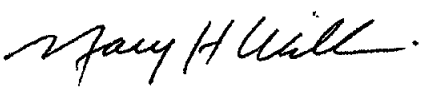
and the fact that dinner and a continental breakfast would be served at the hotel. But they make no mention of the cost to Montauk TriGuard. The only piece of information we identified that arguably suggests some awareness of cost is the entry on the "OUT-OF-STATE TRAVEL AUTHORIZATION FORM" indicating that "lodging is expected to be within federal per diem." But given that OST was aware of the date of the stay and the hotel in question, it seems to us that OST could reasonably develop an expectation with respect to the value of the stay.

You also argue that OST needed to use the records to comply with a Department of Administrative Services policy charging state agencies "with the responsibility of scrutinizing travel paid or reimbursed by outside sources to ensure that the travel is in line with the agency's mission, that the offer does not conflict with ORS 244.040, and that the travel does not constitute luxurious travel." Oregon Accounting Manual 40.10.00.PO.126. Under the circumstances, we conclude that OST would not require specific cost information to perform such scrutiny. OST was aware of the purpose for the travel, the method of travel, and the hotel in question, and OST could use that awareness to determine whether the travel was "in line with the agency's mission." Nor did OST require specific cost information to determine whether the travel conflicts with ORS 244.040; clearly the travel was of some value, and we do not see why a precise valuation would be necessary to evaluate whether the travel constituted financial gain that would implicate ORS 244.040. Finally, given that OST knew the identity of the hotel where Mr. Hershey was staying, and had information indicating that Mr. Hershey was flying coach class on commercial flights, we believe that OST could determine whether the travel was "luxurious" without knowing the precise cost of the travel.

Our conclusions that the requested records are not owned by OST and were not used by OST mean that the records are not "public records" within the meaning of Oregon's Public Records Law. While it may be desirable to have a public record of precise amounts expended by a private entity for public employees to travel on the public's business, particularly where the public's business directly concerns the entity that is paying for the travel, we looked diligently to find such a requirement under Oregon law and were unable to find one. If the legislature has not imposed requirements that would promote transparency in this regard, we cannot create such requirements in this order.

For the reasons explained above, your petition is respectfully denied.

Sincerely,



MARY H. WILLIAMS
Deputy Attorney General

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c: Darren Bond, Deputy Treasurer