ELLEN F. ROSENBLUM
ATTORNEY GENERAL

FREDERICK M. BOSS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4400

November 6, 2018

VIA EMAIL ONLY: elukens@wescompapers.com and Bill.N.Peters@state.or.us

Erik Lukens
The Bulletin
P.O. Box 6020
Bend, OR 97708

Bill Peters
Department of Environmental Quality
700 NE Multnomah Street, Suite 600
Portland, OR 97232

Re: Petition for Public Records Disclosure Order
Department of Environmental Quality
DOJ File No.: 340990-GA0064-18

Dear Mr. Lukens and Mr. Peters:

This letter is the Attorney General's order responding to Mr. Lukens' petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. The petition, received by this office on October 19, 2018,[1] asks the Attorney General to order the Department of Environmental Quality (DEQ) to produce information about participants in Oregon's Clean Fuels Program ("CFP" or "program"). Specifically, Mr. Lukens seeks the identities of participants in particular transactions on the CFP credit market. DEQ denied Mr. Lukens' request for this information, asserting that it is exempt from disclosure as a trade secret. For the reasons discussed below, we grant the petition and order DEQ to provide the requested information.

The Clean Fuels Program

Oregon's CFP was implemented in 2016 with the goal of reducing the average carbon intensity[2] of Oregon's transportation fuels by 10 percent over a 10-year period. In order to comply with the new standards, fuel providers can blend lower carbon biofuels such as ethanol,

[1] Thank you for granting an extension on the deadline to issue this order.

[2] In general terms, carbon intensity is the measure of the lifecycle greenhouse gas emissions from a transportation fuel. It encompasses the emissions associated with a particular fuel's extraction, production, distribution and combustion. *See* OAR 340-253-0040.

biodiesel or renewable diesel, or provide alternative fuels such as natural gas, electricity, propane or hydrogen.[3] DEQ determines, by rule, which fuel providers and fuel types are regulated under the program. *See* OAR Chapter 340, Division 253. A fuel's carbon intensity is also determined according to criteria specified in DEQ rules. *See* OAR 340-253-0400.

Fuel suppliers that fail to meet the carbon reduction standard in a given year generate deficits. Suppliers that provide fuels with carbon intensities lower than the annual standard generate credits.[4] Suppliers that generate net deficits can achieve compliance with the program's annual standards in various ways, including by buying credits from credit generators. *See* ORS 468A.271(1). Credit transactions are conducted through a DEQ-administered credit market that is managed through DEQ's CFP Online System.[5] Although DEQ certifies the eligibility of market participants and tracks credit transactions, DEQ does not broker individual credit sales or purchases. By the end of August 2018, DEQ reported more than 120 completed credit transactions since the program's inception, totaling more than $17.5 million. At least some of the cost of those credit purchases may be passed along to consumers.[6]

Although credit transactions are conducted privately, they are reported to DEQ for compliance and public reporting purposes. Each year DEQ must publish on its website the average cost or cost-savings per gallon of gasoline and diesel attributable to the CFP, as well as the annual reductions in greenhouse gas emissions attributed to the low carbon fuel standards. *See* ORS 168.271(4). It must also report the volume-weighted average price of credits each month, and include the nonaggregated data DEQ used to make its calculations.[7] *See* ORS 468A.271(3). In publishing this data, DEQ is prohibited from posting on its website any "individually identifiable information or information that would otherwise constitute a trade secret under ORS 192.345." ORS 468A.271(3)(b).

DEQ asserts that revealing the identities of the parties to individual credit transactions would disclose conditionally exempt trade secrets. In support of its claim, DEQ provided declarations from the approximately 40 companies that have participated in the CFP credit market. Among them, 35 participants asserted that disclosing individually identifiable credit market transactions – to include the timing, volume, pricing, and identity of other contracting parties – would reveal confidential business information. Several companies, including both credit buyers and credit generators, provided more detailed explanations of how they protect this information and how disclosure would put them at a competitive disadvantage. Several

---

[3] *See* DEQ, *Clean Fuels Program*, https://www.oregon.gov/deq/aq/programs/Pages/Clean-Fuels.aspx (accessed October 30, 2018).

[4] Each credit equates to one metric ton of carbon dioxide that was not emitted as a result of the use of alternative fuels. *See* ORS 468A.265.

[5] *See* DEQ, *CFP Online System*, https://www.oregon.gov/deq/aq/programs/Pages/Clean-Fuels-Online.aspx (accessed October 30, 2018).

[6] DEQ estimates the average cost of the CFP was 0.23 cents per gallon for E10 gasoline, and 0.31 cents per gallon of B5 diesel fuel in 2017. *See* DEQ, *Data for the Clean Fuels Program*, https://www.oregon.gov/deq/aq/programs/Pages/Clean-Fuels-Data.aspx (accessed October 30. 2018).

[7] The nonaggregated data posted on DEQ's website currently includes the proposed date, accepted date, average credit price and total number of credits transferred for each credit transaction since the program's inception. *See* DEQ, *Data for the Clean Fuels Program*, https://www.oregon.gov/deq/aq/programs/Pages/Clean-Fuels-Data.aspx (accessed October 30, 2018).

declarations suggested that disclosure could have negative consequences to the overall credit market, such as credit price manipulation by non-regulated credit generators. Predictions ranged from artificially high credit prices, to artificially low credit prices, to outright collapse of the credit market. Finally, we note that three market participants declared that they do not consider the requested information to be a trade secret and two participants did not provide declarations.[8]

Oregon Public Records Law and Trade Secrets

The Public Records Law confers the right to inspect public records in Oregon, unless such records are exempt under ORS 192.338, 192.345, or 192.355. ORS 192.314(1). The law is a disclosure law, and exemptions from disclosure must be express. Even express exemptions are to be narrowly construed, 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 App 666, 676 (2008). This requirement reflects "the strong and enduring policy that public records and governmental activities be open to the public." *Jordan v. Motor Vehicles Division*, 308 Or 433, 438 (1989). Any person denied the right to inspect or to receive a copy of a public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.411(1). A public body that asserts a statutory exemption from disclosure has the burden of demonstrating that the law permits the records in question to be withheld from public disclosure. *Id.*

ORS 192.345(2) permits, but does not require, public bodies to withhold "trade secrets" from disclosure. "Trade secrets" are defined within Oregon's Public Records Law as including, but not limited to:

> [A]ny 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 192.345.

The Public Interest Requires Disclosure

As a preliminary matter, we observe that the information Mr. Lukens seeks does not seem to be "known only to certain individuals *within an organization*" (emphasis added). All parties to a particular transaction presumably know with whom they are dealing. And a party's identity is not a "formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information." On the other hand, this statutory list describes examples that trade secrets "may include, but are not limited to," so we cannot assume the statutory list is

[8] With respect to these five participants, we conclude DEQ has failed to meet its burden of demonstrating that associating the participants' identities with specific credit transactions is a trade secret.

exhaustive. Moreover, disclosing the identities of the transacting parties also reveals specifically the prices at which those participants bought or sold credits, and the number of credits they bought or sold. Thus, the effect of the disclosure requested by Mr. Lukens would go beyond disclosing the identities of market participants – though it still would not disclose any information not known by all parties to a given transaction.

Despite our skepticism, however, we need not determine whether the information requested qualifies as a trade secret because we conclude that the public interest requires disclosure in any case. There is substantial public interest in the efficient pricing of CFP credits. Efficient credit pricing should not only mean lower prices at the pump, but it would also mean that the legislative goal of carbon reduction is being achieved efficiently. We believe that any economic impact disclosure may have on individual participants or to the broader credit market will be offset by the benefits of transparency. Those benefits include greater public understanding of who profits financially from this consumer-funded regulatory program. This, in turn, will ensure the public and legislators are better able to evaluate, and potentially improve, the program's efficiency.

In evaluating the arguments for and against disclosure, we consulted University of Oregon Economics Professor Bill Harbaugh. He reported that the costs and benefits of disclosure on the CFP credit market in this case are uncertain. He noted that the credit market is still relatively new and there are few participants, making inefficiencies and collusion possible. However, he also observed that transparency should make it easier for the market participants and others to detect any collusive – and potentially illegal – market behaviors that could contribute to market inefficiencies. He noted that transparency might harm some participants' private interests by making it more difficult for them to negotiate advantageous prices, but this harm would be offset by gains to other participants. He concluded that on balance the public interest in the efficient operation of the credit market would likely be better served by revealing the details of individual transactions than by keeping those details confidential.[9] He also noted that – given the nature of the petroleum industry and the relatively large size of many of the CFP program participants – the economic impact to individual companies from disclosing their credit transactions will likely be negligible when compared to other publicly available information and to macroeconomic fluctuations in business activities at the regional, national and international level. Accordingly, we perceive only an attenuated possibility that disclosure could substantially harm either the commercial interests of individual CFP participants or the broader credit market. If DEQ is correct that some competitive disadvantage may result, we nevertheless conclude that such disadvantage is outweighed by the significant public interests served by disclosure.

We briefly address DEQ's arguments that disclosure will not further the public interest. First, DEQ suggests that the legislature already addressed the public's interest by requiring DEQ

[9] Our research revealed additional support for Professor Harbaugh's conclusion that price transparency in regulated markets may improve market efficiency. *See, e.g.*, CRS Report for Congress, *Does Price Transparency Improve Market Efficiency? Implications of Empirical Evidence in Other Markets for the Health Sector* (July 24, 2007), *available at*: https://fas.org/sgp/crs/secrecy/RL34101.pdf (empirical evidence suggests that price transparency leads to lower and more uniform prices, as predicted by standard economic theory).

to publish detailed credit transaction data, but prohibiting DEQ from posting individually identifiable data or trade secrets on its website. *See* ORS 468A.271. We are not persuaded by this argument. The legislature could have, but did not exempt participant identities from disclosure in the context of public records requests.[10] Moreover, we believe the Public Records Law requires individualized assessments of the public interest in each case.

Next, DEQ explains that disclosing participant-specific data would not convey a complete picture of the overall efficiency of the state's program because it does not capture information about relevant transactions outside of the state. For example, DEQ does not capture data about low-carbon fuel producers that sell their fuels at a premium outside of Oregon to companies that are importing them to Oregon. We do not believe this is a particularly compelling argument for non-disclosure in this instance. It could just as easily be understood to argue for even greater data collection and transparency.

Finally, DEQ notes that regulated parties are required to participate in the CFP, unlike credit generators. Publicly disclosing their transaction data will put them at a business disadvantage – both inside and outside of Oregon – relative to companies that are not required to participate. On a related point, DEQ stresses that Oregon's credit market is relatively new and does not yet meet the normal tests for liquidity in commodity markets. This, in turn, makes the market more susceptible to manipulation by sophisticated participants. As noted above, however, participants' predictions about the impacts of disclosure on the credit market vary considerably. Those predictions are also inherently speculative. Our research, and Professor Harbaugh's analysis, reveals that it is at least as likely the efficiency of the credit market will improve as a result of greater transparency. It is in the public interest to achieve the goals of the CFP as efficiently as possible. We are not persuaded that credit price manipulation is the most likely result of disclosure. Given its integral role in the credit market, we believe DEQ has adequate tools to detect and deter such activities. And, as noted above, transparency could actually make such manipulations easier to detect.

For the foregoing reasons, Mr. Lukens' petition is granted. We order DEQ to disclose to Mr. Lukens the data he requested. DEQ has seven days within which to comply or announce its intention to seek judicial review. ORS 192.411(2).

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

FMB:pjn/DM9244696

[10] Although ORS 468A.271 prohibits DEQ from affirmatively posting "individually identifiable information" on its website, this provision does not create an express exemption from disclosure under the Public Records Law. In this regard, we note that the legislature *did* expressly exempt from disclosure certain credit transaction data for regulated parties required to participate in the credit clearance market, but even in that context the legislature did not exempt identifying information. *See* ORS 468A.276(8).