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Re: Petition for Public Records Disclosure Order
Oregon Lottery
DOJ File No.: 177001-GA0148-19 and 177001-GA0149-19

Dear Mr. Ramsey, Mr. Manning and Mr. Shelby:

This letter is the Attorney General's order responding to petitions submitted by Mr. Ramsey and Mr. Manning for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Their petitions, received by this office on December 5, 2019 and December 12, 2019,[1] ask the Attorney General to order the Oregon Lottery ("Lottery") to produce certain records related to its sports betting "Software Access and Service Agreement" ("SBTech Agreement") with SBTech Malta ("SBTech").

Specifically, both petitioners seek an unredacted copy of "Exhibit 4: Fees and Payments" ("Exhibit 4") to the SBTech Agreement. Mr. Manning also seeks the report of the Oregon State Police's security review ("OSP report") of SBTech, conducted on behalf of Lottery. In response to petitioners' initial requests, Lottery disclosed a heavily redacted version of Exhibit 4 claiming the redacted information was exempt from disclosure under ORS 192.345(2) as a trade secret.

[1] We thank Mr. Ramsey and Mr. Manning for granting an extension on the deadline to issue this order.

Lottery also denied Mr. Manning's request for the OSP report asserting that it was exempt in its entirety under ORS 192.345(23) because disclosure would reveal security measures. For the following reasons, we grant the petitions with respect to Exhibit 4, and deny Mr. Manning's petition as to the OSP report as moot.

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. 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). The agency carries the burden to sustain its actions. ORS 192.411(1).

We begin by evaluating Lottery's argument that the information it redacted from Exhibit 4 is exempt from disclosure under ORS 192.345(2) as a trade secret. That provision conditionally exempts from disclosure:

> [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.

Id.[2]

In this case, SBTech asserts the information redacted from Exhibit 4 consists of the company's "proprietary pricing model and commercial terms for the provision of its software and services, as negotiated with the Oregon State Lottery." SBTech claims the redacted information is highly proprietary in nature, that it has substantial commercial value, that it is known by less than 1% of its employees, and that its disclosure would both interfere with the company's contractual relationships with existing customers and put it at a competitive disadvantage in the relatively new sports betting marketplace. In response to these petitions, Lottery has accepted SBTech's representations without qualification or additional support.

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[2] We have also observed that the Public Records Law definition of a trade secret is not exclusive, and so trade secrets may also include information encompassed by the Uniform Trade Secrets Act (UTSA), ORS 646.461 to 646.475. *See Attorney General's Public Records and Meeting Manual* at 54 (2019). That Act defines trade secrets, at ORS 646.461(4), as:

> (4) *** information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique or process that:
>
> (a) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
>
> (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Lottery also asserts that several provisions relating to termination fees contained in Section 9 of Exhibit 4 are exempt from disclosure as Lottery's trade secrets. Finally, Lottery explained that the pricing and commercial terms contained in Exhibit 4 were agreed to by Lottery and SBTech after lengthy negotiations, and do not encompass the pre-existing trade secrets of either party.

It is not uncommon for government contracts to contain confidentiality provisions relating to the parties' respective trade secrets or proprietary information. For example, Section 15 of the SBTech Agreement contains a provision that states "each Party may have access to or become acquainted with various trade secrets and other confidential and proprietary information *of the other Party* * * * and shall protect *each other's* Confidential Information from improper disclosure * * *" (emphasis added). However, we believe the definition of a trade secret in the Public Records Law contemplates that trade secrets generally consist of internal information, which is consistent with the common understanding of the term. For example, the definition refers to information known "by certain individuals *within an organization*" that is "*used* in a business *it conducts*." ORS 192.345(2) (emphasis added). Indeed, the just-quoted terms of SBTech Agreement are consistent with that understanding of the concept of trade secrets. And the United States Supreme Court's recent interpretation of Exemption 4 of the Freedom of Information Act – which relates to trade secrets and confidential commercial or financial information – is also consistent with our understanding. *See Food Marketing Institute v. Argus Leader Media*, 139 SCt 2356, 2363 (2019) (Exemption 4 protects information that is "imparted by" an "owner" to a "party receiving it"); *see also*, *McDonald Douglas v. US Department of the Air Force*, 375 F3d 1182 (DC Cir 2004) (certain pricing information that a contractor was "required *to provide to* the [government] * * * in order to compete for [a] contract" was exempt under FOIA Exemption 4 and the Trade Secrets Act).

In this instance, the contract terms Lottery and SBTech seek to withhold were developed jointly and, according to Lottery, do not incorporate the pre-existing internal trade secrets of either party. We have not found any cases supporting the notion that contract terms negotiated at arm's length between a public body and a business entity qualify as a trade secret of either one of them. A finding that negotiated contract terms can be a trade secret would present all sorts of practical problems – such as contract enforcement and determining ownership of the proprietary information when the contract terminates – which may explain our inability to find any authority for such a determination. Moreover, we see no reason why Lottery's argument could not be applied to any number of terms of any public contract, if the public body were simply to decide – with the agreement of its contractor – that it wishes to keep contract terms confidential.

We recognize Lottery's concerns about the disclosure of this information, but we note that the legislature knows how to extend more explicit protections to sensitive business information for public bodies that are engaged in activities that generate revenue. *See, e.g.,* ORS 192.345(34) (conditionally exempting sensitive business, financial, or commercial information of the State Accident Insurance Fund Corporation); ORS 192.355(21) (expressly exempting same for the Oregon Health and Sciences University); and ORS 192.355(30) (expressly exempting same for Oregon Corrections Enterprises). If Lottery had a similar exemption we might conclude that this information, or some of it, could be withheld on that basis. But we cannot create such an exemption and we are not persuaded that, when it enacted a

general exemption for trade secrets, the legislature intended to authorize public bodies to keep secret contract terms that public bodies negotiate at arms' length. We therefore grant both petitions with respect to the information Lottery withheld from Exhibit 4 as a trade secret.

Regarding the OSP report, Lottery informs us that it no longer considers the report exempt in its entirety. It has therefore agreed to process Mr. Manning's request, subject to the redaction of any information it concludes is exempt. *See* ORS 192.338 (duty to separate exempt and nonexempt material). If Mr. Manning disagrees with any such redactions, he may petition this office for review. Because Lottery has agreed to process Mr. Manning request for the OSP report, we deny that aspect of his petition as moot.

For the foregoing reasons, we grant the petitions as to the information Lottery withheld as a trade secret and order Lottery to disclose an unredacted copy of Exhibit 4 of the SBTech Agreement to Mr. Ramsey and Mr. Manning. Lottery has seven days within which to comply or announce its intention to seek judicial review. ORS 192.411(2). With respect to Mr. Manning's request for the OSP report, we respectfully deny that aspect of his petition as moot.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

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