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February 24, 2021

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Scott Crampton
900 Hobbs Rd #119
Greensboro, NC 27410

Robert Baxter
Oregon Judicial Department
1163 State Street
Salem, OR 97301-2563

Re: Petition for Public Records Disclosure Order
Oregon Judicial Department
DOJ File No.: 198040-GA0010-21

Dear Mr. Crampton and Mr. Baxter:

This letter is the Attorney General's order responding to Mr. Crampton's petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. His petition, received by this office on February 3, 2021,[1] asks the Attorney General to order the Oregon Judicial Department (OJD) to disclose the Pricing Proposal for Tyler Technology Inc.'s ("Tyler") response to an OJD Request for Proposal. For the reasons discussed below, we grant Mr. Crampton's petition.

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 construed narrowly to further the public purposes served by disclosure. If a responsive record contains both exempt and nonexempt material, the agency shall separate and disclose the nonexempt material. ORS 192.338. Any person denied the right to inspect or to receive a copy

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

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).

a. Background.

In September 2020, OJD submitted a Request For Proposal (the "RFP") for a new Online Dispute Resolution System to help manage parking citations, violations, and small claims court. Paragraph 3.2.1 of the RFP states, in relevant part:

> **Cost information must be submitted as a separate sealed envelope.** *** In addition, if Proposer believes any of its Proposal is exempt from disclosure under Oregon Public Records Law *** Proposer shall complete and submit the Affidavit of Trade Secret *** and a fully redacted version of its Proposal, clearly identified as the redacted version.

(Emphasis in original.) Paragraph 3.4.8 directs proposers to "[s]ubmit a detailed Cost Proposal (**Attachment G**) in accordance with the instructions contained therein." (Emphasis in original.) Paragraph 3.4.9 contains the following notice and instructions:

> This RFP and one copy of each Proposal received in response to it, together with copies of all documents pertaining to the award of a Contract, shall be kept by OJD and made a part of a file or record that may be open to public inspection. If a Proposer believes that any portion of its Proposal contains any information that is a trade secret under ORS Chapter 192.345(2) or otherwise is exempt from disclosure under the Oregon Public Records Law ***, Proposer shall complete and submit the Affidavit of Trade Secret *** and a fully redacted version of its Proposal as set forth in Section 3.2.1 above. *Proposer is cautioned that cost information generally is not considered a trade secret under Oregon Public Records Law ***. If Proposer fails to identify the portions of the Proposal that Proposer claims are exempt from disclosure, Proposer has waived any future claim of non-disclosure of that information*.

(Emphasis added.)

OJD received proposals from five companies, including Tyler. Consistent with paragraphs 3.2.1 and 3.4.9 of the RFP, "Section 8 – Cost Proposal" of Tyler's main proposal states "Tyler has responded with a pricing proposal that includes **Attachment G** and is bound in a separate binder as required by the RFP." (the "Pricing Proposal" or "Tyler's Pricing Proposal") (Emphasis in original.) Tyler's Pricing Proposal consists of two documents – a two-page document titled "Cost Proposal" and an eight-page document titled "Attachment G Cost Proposal Form." Tyler's main proposal includes an Affidavit of Trade Secret ("Affidavit"), wherein Tyler identifies the "Attachment G Cost Proposal" portion of Tyler's Pricing Proposal as exempt from public disclosure as a trade secret.

On January 20, 2021, OJD informed the five Proposers that it was cancelling the RFP and would possibly revise and reissue it in the future. Thereafter, Mr. Crampton, on behalf of one of the Proposers, requested copies of the other proposals. OJD disclosed the other four proposals, including the previously sealed cost proposals, except Tyler's Pricing Proposal. In its February 2, 2021 response to Mr. Crampton, OJD asserted, consistent with Tyler's claim, that Tyler's Pricing Proposal is exempt from disclosure as a trade secret under ORS 192.345(2). Mr. Crampton's petition followed.

b. OJD's Claim of Trade Secrets

OJD asserts that Tyler's Pricing Proposal is exempt from disclosure as a trade secret under ORS 192.345(2). 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. We have also observed that the Public Records Law definition of a trade secret is not exclusive, and so trade secrets may include information encompassed by Oregon's Uniform Trade Secrets Act (UTSA), ORS 646.461 to 646.475.[2] *See Attorney General's Public Records and Meeting Manual* at 54 (2019) ("*Manual*"). 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.

We recognize that in responding to public records requests and petitions, agencies are in the difficult position of proving that third-party information is exempt as a trade secret. We have therefore advised that they obtain relevant factual information and, where appropriate, legal argument supporting the assertion of the trade secret exemption from the entity that provided the sensitive business information. *See Manual* at 55 (2019). The relevant facts that agencies should solicit include: a) internal steps the entity takes to keep the information secret, b) steps

[2] Neither OJD nor Tyler have asserted that Tyler's cost proposal is exempt from disclosure under Oregon's Uniform Trade Secrets Act.

taken to ensure information shared with outside parties is kept secret, c) the economic value of the information to a competitor or how it could be used to economically harm the entity, and d) the time, effort and expense needed to compile the information. *Id*. (citations omitted).

In response to Mr. Crampton's records request, OJD requested Tyler provide support for its claim that the Pricing Proposal is a trade secret. Regarding the internal steps Tyler takes to maintain the secrecy of this information, Tyler replied:

> Tyler keeps its line-item pricing confidential by limiting access to said information internally. Only those individuals with a demonstrated business purpose for accessing pricing information are permitted to do so. Tyler marks all quotes or proposals containing line-item pricing, whether proposed or final, as confidential. All employees sign confidentiality agreements that require them to maintain the confidentiality of Tyler's business information, including its line-item pricing.

Regarding the steps Tyles takes to prevent the further disclosure of company secrets when shared with third parties, Tyler responded:

> In the event pricing information is shared with outside entities that are not clients or potential clients, Tyler shares such information under an appropriate confidentiality agreement that prohibits disclosure. When pricing information is shared with clients or potential clients, Tyler marks the information as confidential and to the extent possible, executes confidentiality agreements to protect the same. However, as nearly all Tyler clients are governmental entities, freedom of access/information laws often prohibit clients or potential clients from signing such agreements. In those instances, Tyler protects its pricing information by marking it as confidential trade secret (as we did in this case), exempting it from disclosure under applicable law, and vigorously defending its trade secret status in the event our pricing information is requested under the client's applicable freedom of information law.

Tyler provided the following description of the economic value of its Pricing Proposal to Tyler's competitors, and the potential economic harm to Tyler if it is disclosed:

> In the event Tyler's pricing information became known to its competitors, it would have substantial economic value to them, and would harm Tyler. Knowledge of Tyler's line-item pricing would allow a competitor to structure its bids/offers in such a way to undercut Tyler's pricing. In the highly competitive public sector software market, where most business is awarded only after an extensive RFP/Bid process, where cost is a substantial factor in awarding business, the ability of a competitor to know Tyler's pricing in advance would confer a huge competitive advantage that would make it difficult for Tyler to win business. This is particularly true here, where this RFP was cancelled, and may be re-bid in the future. Having a competitor know Tyler's exact pricing model ahead of time is an unfair advantage that violates the spirit, if not the letter, of the procurement rules. Tyler will be unfairly and substantially harmed if its pricing is disclosed to competitors.

Finally, Tyler indicated that it has spent substantial time, effort and expense to develop its line-item pricing. Specifically, Tyler explained:

> Tyler's line-item pricing structure for individual software modules and services is a highly nuanced framework that Tyler has refined over its many years in business. It is constantly evaluated, updated, and improved to position Tyler to be competitive on an ongoing basis. It requires a continuous effort of many Tyler employees to make sure that our pricing is competitive, but also sufficient to cover expenses and a fair return. In essence, Tyler's pricing information is the culmination of its hard-earned experience and expertise in the marketplace, developed over decades of refinement and effort.

In response to Mr. Crampton's petition, we inquired whether Tyler considered the entire Pricing Proposal to be a trade secret, or just the line-item pricing. We also inquired whether, given the requirement to segregate exempt and nonexempt material, Tyler opposed the disclosure of a redacted version of the Pricing Proposal. Tyler replied:

> Tyler considers the entirety of its [Pricing Proposal] to be a trade secret. Tyler's focus on the line-item pricing is illustrative of what it believes to be the most valuable trade secret information in its [Pricing Proposal], but Tyler's general position is that all the information contained therein constitutes a trade secret. Tyler only agrees to narrow its claim to just the line-item pricing when its general position outlined above fails under applicable law.

We also asked whether it was Tyler's position that the Pricing Proposal would remain a trade secret even if Tyler had been awarded the contract in this instance. Tyler replied:

> Yes, our position would be the same even if we had won the bid. While our claim is stronger since this remains a potential competitive opportunity, Tyler's position is that even if it had been awarded the bid, its pricing information would be trade secret. Tyler understands that certain jurisdictions require disclosure of the total cost of an awarded bid. In those instances, we limit our claim to everything except the total award value.

In response to Tyler's assertions, Mr. Crampton argued that the public interest requires disclosure in this instance regardless of whether Tyler's Pricing Proposal is a trade secret. In this regard, he emphasized that all of Tyler's competitors' cost proposals for this RFP were disclosed. He also argued that Tyler's concerns about economic harm are speculative because if OJD ever re-issues the RFP, it will likely have different requirements that will require a different pricing.

c. Analysis

We begin by reiterating that OJD has the burden of sustaining its decision to withhold Tyler's Pricing Proposal from Mr. Crampton. ORS 192.407(1). To meet that burden, OJD has elected to rely exclusively upon Tyler's arguments, as recounted above. Under the totality of the

circumstances, we conclude that OJD has failed to meet its burden of proving that Tyler's Pricing Proposal is a trade secret.

When a record contains both exempt and nonexempt information, ORS 192.338 requires agencies to separate and disclose the nonexempt material. Nonetheless, Tyler asserts that *all* information in its Pricing Proposal is exempt as a trade secret. We cannot accept this broad assertion because we have identified a significant amount of information in the Pricing Proposal that clearly cannot be a trade secret of Tyler. For example, there is no basis for us to conclude that *any* of the information contained on the following pages has actual or potential commercial value: page 1 (cover sheet), page 2 (Table of Contents), page 5 (cover sheet for Attachment G), or page 6 (OJD's Attachment G Instructions). It also appears that only two sentences on page 7 can be attributed to Tyler. The remaining pages are comprised partly of nonexempt OJD forms and instructions, from which the Tyler-specific data included on those pages could be easily redacted. When asked whether it would agree to the disclosure of a redacted version of the Pricing Proposal, Tyler asserted that the entirety of its Pricing Proposal is a trade secret. In general, we cannot rely upon such a generalized assertion of trade secrets, particularly when our review of the Pricing Proposal reveals that it contains substantial nonexempt material. *See Manual* at 55 (agencies cannot rely merely on an entity's assurance that the information is a trade secret) (citation omitted).

Next, we observe that, notwithstanding Tyler's claim that it marks *all* of its pricing information as "confidential," nothing in Tyler's proposal is marked confidential. This is true for the Pricing Proposal, as well as for Attachment I to Tyler's proposal, which was disclosed to Mr. Crampton and which contains extensive pricing information for additional features and services not included in Tyler's base pricing proposal. It appears the only efforts Tyler took to protect any of the information in its proposal were to identify Appendix G in the Affidavit and to include the following on the cover sheet of the Pricing Proposal "[t]his document contains proprietary trade secret information of Tyler Technologies Inc. ***." Although Tyler now asserts that the entire Pricing Proposal is a trade secret, we find no evidence that Tyler took any steps when submitting its proposal to OJD to identify the two-page Cost Proposal contained in the Pricing Proposal as a trade secret – it is not expressly identified in the Affidavit and it is not marked "confidential" or "trade secret."

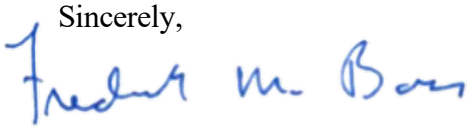
We find the fact that Tyler did not include the Cost Proposal in its Affidavit significant because, under the terms of the RFP, Tyler has arguably waived any claim it may have to the non-disclosure of the Cost Proposal. Although our job here is to determine whether the Cost Proposal is exempt from disclosure, and not whether the apparent waiver is enforceable, we presume that Tyler was aware of the RFP's waiver provision and was on notice that "cost information generally is not considered a trade secret under Oregon Public Records Law." *See* OJD RFP, para 3.4.9. We therefore regard Tyler's failure to expressly include the Cost Proposal – and Attachment I for that matter – in the Affidavit as evidence that Tyler did not take reasonable steps to ensure that *all* of the pricing information it shared with OJD would remain

secret.[3] *See* Public Records Order, Mar 11, 2013, Meiffren (by failing to check a box indicating information was submitted in confidence, submitters failed to make reasonable efforts to maintain secrecy of the information). Under the circumstances, we conclude that OJD has failed to prove that the Cost Proposal included in Tyler's Pricing Proposal is exempt from disclosure as a trade secret.

This conclusion also affects the status of the information contained in the only document that Tyler expressly identified as containing trade secrets –Attachment G. Our comparison of the Cost Proposal with Attachment G revealed that most, if not all, of the pricing information contained in Attachment G – including line-item prices, key pricing assumptions, and total cost – is separately included in the Cost Proposal. It follows that any pricing information contained in Attachment G that also appears in the nonexempt Cost Proposal cannot be exempt as a trade secret. And because Tyler broadly asserts the entire Pricing Proposal is a trade secret, we have no meaningful way to assess whether any of the remaining information in Attachment G constitutes a trade secret. We therefore conclude that OJD has not met its burden of proving that the information contained in Attachment G is exempt as a trade secret.

In conclusion, we find that Tyler failed to take reasonable steps to protect as a trade secret the pricing information contained in its Pricing Proposal. We also find Tyler's claim that the entire Pricing Proposal is a trade secret to be overbroad and not in compliance with the requirement to separate and disclose nonexempt portions of the records. And because OJD has relied exclusively upon Tyler's submissions in responding to this petition, we conclude that OJD has failed to meet its burden in this instance. We therefore grant Mr. Crampton's petition and order OJD to disclose an unredacted copy of Tyler's Pricing Proposal to Mr. Crampton. OJD 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/
c via e-mail only: Catherine Susman, OJD

[3] The inclusion of the two-page Cost Proposal as part of Tyler's "sealed" Pricing Proposal might be viewed as some evidence that Tyler took steps to protect the Cost Proposal as a trade secret. But we note that the RFP required Proposers to submit their cost proposals in a separate sealed envelope regardless of whether they contained trade secrets. According to the terms of the RFP, the only appropriate way for Proposers to identify information they considered exempt from disclosure was to expressly identify the information in the Affidavit.