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September 9, 2022

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Eric Ramsey
Cantena Media
11700 West Charleston Blvd
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Matthew Shelby
Oregon Lottery
500 Airport Rd
Salem, OR 97301

Re: Petition for Public Records Disclosure Order
Oregon State Lottery
DOJ File No.: 177001-GA0054-22

Dear Mr. Ramsey and Mr. Shelby:

This letter is the Attorney General's order responding to Mr. Ramsey's petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. His petition, which we received June 22, 2022,[1] asks the Attorney General to order the Oregon State Lottery ("Lottery") to disclose the definition of "Online Sportsbook Net Gaming Revenue," portions of which were redacted from a copy of Lottery's online sports betting agreement that was disclosed to him. For the following reasons, we grant Mr. Ramsey'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 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). 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).

Mr. Ramsey's petition stems from a request for Lottery's online sports betting agreement (the "agreement") with Crown OR, a subsidiary of DraftKings Inc. Lottery disclosed the agreement to him with several redactions, and his appeal relates to the portions redacted from the definition of "Online Sportsbook Net Gaming Revenue" ("NGR"). The term is a key provision

[1] We thank Mr. Ramsey for granting an extension of time in which to respond to his petition.

of the agreement because the share of online sports betting proceeds that Lottery and DraftKings receive are expressed as a percentage of NGR; i.e., Lottery receives 51% of NGR and DraftKings receives 49% of NGR. Mr. Ramsey asserts that:

> There are currently 30 U.S. states plus the District of Columbia that have legal/regulated sports betting in some capacity, and Oregon remains the only one in which the definitions of Gross Revenue and Net Revenue (sometimes called Adjusted Revenue, Taxable Revenue, or some other term) are not known to the public. As a result, Oregon is also the only jurisdiction in which the state's contractual/statutory share of the proceeds is shielded from the public. These terms are typically codified into law in markets that have a competitive commercial operation (like Nevada or New Jersey), but they're also a matter of public record in all other jurisdictions where revenue sharing is tied to tribal gaming compacts or a lottery/vendor relationship (as in Oregon).

Lottery asserts that the material redacted from the definition of NGR 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 also include information encompassed by the Uniform Trade Secrets Act, 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.

Mr. Ramsey argues that the redacted material consists of information that was negotiated between the contracting parties at arm's length. Therefore, he asserts, the redacted material cannot be a trade secret based on our prior determination that contract terms negotiated at arm's length between third parties and public entities are not trade secrets. *See* Public Records Order,

Jan 3, 2020, Ramsey ("PRO Ramsey") (terms in Lottery's initial sports-betting contract were not exempt as the trade secrets of either party).

In response to Mr. Ramsey's petition, we contacted Assistant Attorney General John McCormick, Lottery's DOJ-assigned contact counsel. He explained Lottery's position that the definition of NGR represents a formula that is proprietary to DraftKings that reflects "DraftKings' operational costs incurred in the context of the Lottery/Crown OR contract, and describes specific costs of Crown OR of providing the sports betting platform over which Lottery has no control." He explained that the formula was not developed jointly. Rather, the formula was included in DraftKings' initial proposal and, though independently validated by Lottery, was not the subject of any specific negotiations. According to Mr. McCormick, DraftKings represents that the redacted material is a confidential formula known to less than 1% of company employees, that it requires login credentials and two factor authentication to access electronically, and that it is shared outside of DraftKings only upon the execution of a nondisclosure agreement. However, Mr. McCormick informs us that he was not aware of such an agreement between Lottery and DraftKings in this instance and he does not recall Lottery being asked to sign such an agreement before DraftKings submitted its proposal.

Mr. McCormick further summarized DraftKings' position that:

> While Crown Oregon is the only provider of online sports betting in Oregon, the parent company, DraftKings, operates in highly competitive markets in other states. In order to remain competitive in the growing and somewhat volatile sports betting market DraftKings makes efforts to shield from its competitors certain details of its operations and the costs for those operations with respect to its individual clients' secret[s]. DraftKings asserts that providing to the public the specific costs detailed in the definition of Online Sportsbook Net Gaming Revenue would give DraftKings' competitors information that would negatively affect DraftKings' ability to compete on an even playing field in other markets.

For example, he noted, information redacted from the definition may include "items that DraftKings' competitors have not thought of including in their own financial calculations," such as "caps or *** fixed amounts, of which competitors are unaware."

In response, Mr. Ramsey asserts that even though Lottery has no direct control over DraftKings' operational costs, through is agreement Lottery does jointly control which costs and what portion of those costs DraftKings is permitted to deduct when calculating NGR. Therefore, he contends, these deductions "would undoubtedly be a topic of any good-faith negotiations surrounding this contract," particularly since, from a commercial standpoint, "DraftKings is incentivized to maximize these contractual deductions" while "Lottery is opposingly incentivized to limit these deductions * * * in order to maximize its share of the total proceeds." Therefore, he contends, to suggest that "Lottery did not negotiate the calculation of Net Revenue at arm's length is therefore to suggest that it did not negotiate its share of the proceeds at all."

In this instance we find that Lottery has not met its burden of demonstrating that the redacted material is a trade secret of DraftKings. As Mr. Ramsey notes, we previously concluded that the terms of Lottery's initial sports betting contract were not a trade secret of

either party where those terms were specifically negotiated, developed jointly and where they did not incorporate the pre-existing trade secrets of either party. *See* PRO Ramsey. The chief difference cited here is that the contract terms at issue in our prior order were modified during negotiations, which illustrated that they were not the pre-existing property of either party. In contrast, we understand that the redacted material at issue here was proposed by DraftKings and accepted by Lottery without modification or further negotiation. Lottery argues that this means the redacted material was not "negotiated." We do not agree – the entire contract is a negotiated document. In negotiations, a party may well end up accepting a term exactly as proposed by the other party in exchange for concessions in other areas. That does not mean that the accepted term was not negotiated at arm's length or that it was not bargained for consideration; rather, it only means that the overall negotiations led to the adoption of the term as originally proposed. Moreover, disclosure of the contract alone would not reveal that this particular term was developed by DraftKings and accepted by Lottery as proposed. But for Lottery's explanation to that effect, a person simply reviewing the contract (including a competitor of DraftKings) would have no way to know that the definition is the precise one DraftKings asked for in negotiations, rather than a definition arrived at by compromise.

We also note that the contract does not specifically designate the redacted material as belonging to DraftKings, even though it discusses at some length the types of information that are proprietary to DraftKings. In fact, the contract states that "respective counsel have participated jointly in the negotiation and drafting of this Agreement" and as a consequence "this Agreement will be construed as though drafted jointly by the Parties," regardless of whether one provision was authored by one party or the other. This affirms that the contract is a mutual undertaking and undercuts the argument that one provision of it is somehow the property of DraftKings. It is also consistent with the fact that, despite DraftKings statement that this information is shared outside of the organization only upon the execution of a nondisclosure agreement, there is no evidence that such an agreement was signed by, or even requested of, Lottery.

As a matter of statutory construction, we also conclude that the redacted material does not satisfy the definition of a trade secret under either the Public Records Law or the Uniform Trade Secrets Act. Specifically, because the redacted material was accepted by Lottery as part of a public contract, it cannot be "known only to certain individuals within" DraftKings. ORS 192.345(2). We also find that there cannot be any reasonable expectation that independent economic value will be derived by maintaining secrecy over the bargained for terms in a public contract. We therefore conclude that the redacted material in this case is not information that derives independent economic value "from not being generally known to the public or to others who can obtain economic value from its disclosure * * *." ORS 646.461(4).

The material terms of public contracts are subject to disclosure like any other public documents under the Public Records Law and there is a presumption favoring disclosure. Treating them otherwise would create the same problem we identified in our prior order, effectively allowing public entities to easily shield the material terms of public contracts from disclosure by their agreements with third parties. If that were so, the trade secret exemption could swallow the rule of disclosure for public contracts, which would be inconsistent with the "strong and enduring policy" embodied in the Oregon Public Records Law "that public records

and governmental activities be open to the public." *Jordan v. Motor Vehicles Div.*, 308 Or 433, 438 (1989).[2]

Finally, Lottery argues that the public interest is adequately served by the disclosure of other information that allows the public to know how much of the overall revenues are allocated to DraftKings, and how much Lottery receives. We do not need to reach this question because we have concluded that Lottery has failed to meet its burden of showing that the redacted information qualifies for an exemption in the first place.

For the reasons discussed above, we conclude that the redacted material is bargained for consideration, negotiated at arm's length as part of Lottery's overall contract negotiation. As such, we conclude that it is not a trade secret. We therefore grant the petition and order Lottery to disclose the redacted material to Mr. Ramsey. Lottery has seven days within which to comply or announce its intention to seek judicial review. ORS 192.411(2).

Sincerely,

Lisa M. Udland

Lisa M. Udland
Deputy Attorney General

ACF:pjn

[2] As we recognized in our prior order, the legislature has enacted exemptions for the sensitive business records of a handful of public bodies, most of which appear to compete with private industry. PRO Ramsey at 3 (citing 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 there were an exemption for sensitive business information of the Lottery, we might conclude that such contract terms are protected. But no such exemption exists, and we cannot create one.