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90A-18
CTN 6

Personal Privacy - Confidential Submissions Separation of exempt/nonexempt

DEPARTMENT OF JUSTICE

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August 21, 1986

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Barrett MacDougall, Finance Officer
Economic Development Department
595 Cottage Street NE
Salem, Oregon 97310

Re: Request for Disclosure of Economic Development Department Records Concerning VanRich Casting Loan

Dear Messrs. Maier and MacDougall:

This letter constitutes the Attorney General's order on Mr. Maier's petition for disclosure of Oregon Economic Development Department records relating to Oregon Business Development Fund Loan No. 42 to the VanRich Casting Corporation (Varicast). The petition was filed pursuant to the Oregon Public Records Law, and received by the Department of Justice on July 31, 1986. Mr. Maier courteously agreed to an extension of time until August 21, 1986, for final action on the petition.

The petition for an order of disclosure is allowed in part and denied in part. We have reviewed the Economic Development Department's file documents that are the subject of the disclosure request, and we have considered Mr. Maier's legal memorandum, as well as statements by company and legal representatives of the loan applicant VanRich Casting Corporation. We conclude that certain documents are not exempt from disclosure, but that other documents, in either their entirety or in certain portions, are exempt from disclosure under the Public Records Law. We outline below the reasons for this order, and we describe the documents and information which should and which need not be disclosed.

Mr. Maier previously asked the Economic Development Department to disclose to him its file on Oregon Business

Development Fund Loan No. 42 to VanRich Casting Corporation. That file contains VanRich Casting's application for a loan, documents prepared by the applicant, and documents prepared by the Economic Development Department. The department agreed to make the loan file available to Mr. Maier for inspection, but withheld disclosure of certain documents which it deemed confidential. The department itemized and described the withheld documents as follows:

"Item	Number of Pages	Material
1	1	Loan Summary
2	1	Short Form Pro Forma
3	7	Consolidated Financial Statement Month Ending 1-12-86
4	2	Northwest Foundry Operating Income
5	6	Spread Sheet
6	2	Business Confidential OBDF Factors
7	14	Company History Review + Discussion of Sales
8	4	Varicast's Position in the Market
9	4	Market Strategy
10	76	1983, 1984 and 1985 VanRich Financial Statements
11	2	Fred Meikle Personal Financial Statement
12	13	Interim Financial Statements 1-26-86 and 10-27-85
13	1	Interim Financial Statements Projected through 6-30-86
14	1	Customer/Market Composition
15	8	Pro Forma Financial Statistics
16	5	Loan Summary - Staff Report
17	6	Precis of Company Operations
18	15	Equipment List Appraisal
19	2	Collateral"

The department concluded that all of the above-listed items were exempt from disclosure under both ORS 192.500(1)(b), as trade secrets, and ORS 192.500(2)(c), as information submitted to a public body in confidence. The department determined that Item No. 11, the personal financial statement of Fred Meikle, was also exempt under the personal privacy exemption, ORS 192.500(2)(b). The department further concluded that Items No. 1 (loan summary), 5 (spread sheet) and 16 (loan summary-staff

report) also were exempt under the internal agency communication exemption, ORS 192.500(2)(a).

Upon review, we conclude that Item No. 11, the personal financial statement of Fred Meikel, is exempt from disclosure under the personal privacy exemption from the Public Records Disclosure Law. ORS 192.500(2)(b) exempts from disclosure information of a personal nature if public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest, by clear and convincing evidence, requires disclosure in the particular instance. The party seeking disclosure of personal information has the burden to show that public disclosure would not constitute an unreasonable invasion of privacy.

The financial statement at issue here is an individual financial statement of the president of the corporate loan applicant. Such an individual, as opposed to corporate, financial statement is personal in nature because the information normally would not be shared with strangers. Furthermore, we have been presented with no evidence that clearly and convincingly demonstrates that the public interest requires disclosure in this particular instance, nor have we been shown that public disclosure of the information would not constitute an unreasonable invasion of privacy. Disclosure of Item No. 11 correctly was denied.

We conclude, however, that Item No. 1, a loan summary document prepared for the Economic Development Finance Committee by Economic Development staff is, at this time, not exempt from disclosure under the agency internal advisory communications exemption, ORS 192.500(2)(a). This exemption does not apply in instances where the public interest in encouraging frank communication between government officials clearly is outweighed by the public interest in disclosure. Although the loan summary was prepared by agency staff for consideration by the Finance Committee, it was available for inspection by persons in attendance at a public meeting of the committee. Consequently, the public interest in encouraging frank communication between officials of the Economic Development Department would not be served by denying disclosure of Item No. 1, in this particular instance at this particular point in time.

Item No. 1 should be disclosed. The same loan summary document appears as page 1 of Item No. 5, and therefore that part of Item No. 5 should be disclosed, although the balance of Item No. 5, i.e. spread sheet financial information which also appears as Item No. 16 (loan summary-staff report), partially should be withheld from disclosure for reasons discussed below.

We conclude that the trade secrets exemption from the public disclosure law, ORS 192.500(1)(b) is too narrow to justify a blanket denial of access to the above-listed items. Analysis of the trade secret exemption, however, informs our decision to deny disclosure of substantial amounts of information under the exemption for information submitted to a public body in confidence, ORS 192.500(2)(c).

The trade secrets exemption applies only to commercially valuable information which is unpatented and unknown to but a limited number of individuals within a commercial concern, and which gives its user an opportunity to obtain a business advantage over competitors who do not know the information or use it. Many of the above-listed documents contain customer-specific information, as well as data relating to, and discussions of, marketing and pricing strategy that could be used by the loan applicant to secure a business advantage over its competitors. However, the sensitivity of Economic Development loan applicants to the disclosure of these types of information and itemized business financial information stems from a concern that the applicant's competitors will use the information to gain an otherwise unattainable business advantage over the applicant. This concern raises public and private interests such as those that come into play in the analysis of the exemption from public disclosure of information submitted to a public body in confidence, ORS 192.500(2)(c).

The Economic Development Department correctly identified ORS 192.500(2)(c) as an applicable basis for denying complete disclosure of its file in Loan No. 42. That law exempts from disclosure:

> "Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good

faith not to disclose the information, and when the public interest would suffer by the disclosure. . . . "

The purpose of this exemption is to encourage citizens voluntarily to provide relevant information to governmental agencies with some assurance that the information will be kept confidential. Much of the information sought to be disclosed meets the tests of this exemption.

First, the loan applicant was not required to submit, as part of the loan application process, the detailed customer, marketing and financial statements now sought to be disclosed. Although this detailed information was submitted in conjunction with a loan application and other required documentation, the loan applicant nonetheless voluntarily submitted the more detailed information to facilitate and inform Economic Development Department decisionmaking.

Second, because customer, marketing, pricing and relative financial strength information can be used by an applicant's competitors to gain a business advantage over an applicant, it is reasonable to conclude that such information was of a confidential nature.

Third, it appears that the Economic Development Department obliged itself in good faith not to disclose the information submitted by the applicant or compiled by the agency from the applicant's submissions. A then-applicable agency rule stated the department's policy to keep loan information confidential insofar as permitted by the public records law; agency forms and correspondence utilized at the time the information was submitted contained statements about the agency's policy of confidentiality.

Fourth, disclosure would harm the public interest. The purpose of the Oregon Business Development Fund Loan Program, ORS 280.520 through 280.585, is to provide a public source of money, complementary to private financial sources, for economic development and, more specifically, for business development projects that will promote industries such as manufacturing and thus maintain and create employment opportunities. The Economic Development Department has determined that disclosure of VanRich Casting Corporation's confidential disclosures adversely would

affect its business interests in relation to its competitors and that disclosure of confidential information in this case would discourage other applicants from providing confidential information in the future, and thus jeopardize the Business Development Loan Program.

We agree with the department's assessment of the situation. We also note that a public disclosure that places a business development loan applicant at a distinct disadvantage with its competitors has the potential to jeopardize the applicant's ability to repay the loan and the public interest in repayment of loaned public money. On the other hand, however, the public has a strong interest in knowing that a state-funded loan program is being administered responsibly. We therefore conclude that the confidential information exemption, ORS 192.500(2)(c), does not authorize wholesale withholding of the above-listed documents and the information contained therein.

In our view, ORS 192.500(2)(c) appropriately applies to voluntarily submitted loan information, the disclosure of which would give the applicant's competitors a business advantage over the applicant. Pursuant to ORS 192.500(3), other information is not exempt and must be separated and disclosed.

Accordingly, we issue the following public records orders to the Economic Development Department:

Item No. 1 "Loan Summary." This summary document, prepared by department staff for the Finance Committee and specifically described and discussed above, should be disclosed at this time.

Item No. 2 "Short Form Pro Forma." This one-page statement of projected financial statistics should be partially disclosed, but some portions may be withheld. Specific liabilities and the working line recap may be withheld from disclosure as competitor-sensitive confidential information.

Item No. 3 "Consolidated Financial Statement." This seven-page financial statement includes a Condensed Statement of Profit and Loss for the month ending February 23, 1986, and the year to that date; a Condensed Balance Sheet for the same monthly period and a Consolidated Statement of Changes

in Working Capital for the year to date; a Statement of Profit and Loss for the applicant's Vancouver operation for the same monthly period; a two-page Consolidated Balance Sheet for Portland and Vancouver operations; a Statement of Profit and Loss; a Supplement to Profit and Loss Statements; and a two-page Supplement to Profit and Loss Statements for the same monthly period for the Portland plant and the Vancouver plant. These documents partially should be disclosed, but substantial portions may be withheld as competitor-sensitive confidential information. The information that may be withheld can be described here only in general, illustrative terms. That information specifically is indicated on marked and excised copies submitted to the Economic Development Department with this order. That information includes separate itemizations for the two plants, itemization of cost of sales, itemizations of fixed assets, detailed itemization of liabilities (but not total liabilities), itemization of applications of working capital, and other details of current assets and company liabilities.

Item No. 4 "Northwest Foundry Operating Income." These two October 21, 1985 statements of the operating income of the Northwest Foundry acquired by VanRich Casting Corporation should be partially disclosed. Figures for cost of goods sold, gross profits, G&A and sales may be withheld as competitor-sensitive confidential information.

Item No. 5" Spread Sheet." The first page of this six-page item is the loan summary described and discussed above under Item No. 1. It should be disclosed. The balance of this item consists of documents worked up by department staff from information submitted by the applicant: a two-page Spread Sheet for fiscal years '82 through '85; a Form Spread Sheet Ratio Analysis (February 27, 1986); a Financial Worksheet (March 11, 1986); and a Summary of Credit. These documents partially should be disclosed, but substantial portions may be withheld as competitor-sensitive confidential information. The information that may be withheld can be described here only in general, illustrative terms. That information specifically is indicated on marked and excised copies submitted to the department with this order. That information includes details, but not the totals, of current assets, liabilities, net worth

and a profit after taxes; details of operating cycle and ratio analysis; details of debt service; and references to specific debts.

Item No. 6 "Business Confidential OBDF Factors." This item is the first two pages of a December 5, 1985 narrative discussion of the applicant's situation in the casting industry, the industry's situation, the company's proposed consolidation, and its financing. This document partially should be disclosed, but significant portions, marked on copies submitted with this order, may be withheld as competitor-sensitive confidential information. More specifically, this information is a narrative analysis of information itemized on accounting documents previously discussed and withheld.

Item No. 7 "Company History/Review and Discussion of Sales." This item includes a January, 1986 memo discussing the applicant's 1983-85 sales and profit and loss, and a July 28, 1983 memo reviewing sales and profit and loss for the prior 5 years. These documents partially should be disclosed, but substantial portions may be withheld as indicated on marked and excised copies submitted with this order. The information that may be withheld includes narrative discussions and a graph of detailed financial information exempt from disclosure as competitor-sensitive confidential information. Also withheld are discussions of details of operations relating to market share, market power, labor strategies and pricing strategies, exempt from disclosure as trade secrets and competitor-sensitive confidential information.

Item No. 8 "Varicast's Position in the Market." This four-page item is a narrative discussion of geographic considerations and effect on foundry size; the status of competition in the region; a comparison of the applicant's business; and how the applicant arrived at its position in its market. These documents partially should be disclosed, but substantial portions may be withheld as indicated on marked and excised copies submitted with this order. The information that may be withheld refers to specific customers of the applicant, its marketing strategy and its pricing strategy. This information is exempt from disclosure as trade secret and competitor-sensitive confidential information.

Item No. 9 "Market Strategy." This four-page discussion of the applicant's "Present and Near Term Market Strategy" and its "Longer Term Market Strategy" totally may be withheld from disclosure. The discussion of production capabilities, marketing targets, and competitive advantages is exempt as trade secret and competitor-sensitive confidential information.

Item No. 10 "1983, 1984 and 1985 VanRich Financial Statements." This 76-page item includes three Annual Consolidated Financial Statements, each of which includes a president's report, a report of a certified public accountant, financial statements and additional information such as consolidating balance sheets, statements of operations, net sales and cost of sales, applied expenses and consolidating operating general and administrative expenses. These documents partially should be disclosed, but substantial portions may be withheld as indicated on marked and excised copies submitted with this order. The information that may be withheld generally may be described as the same type of information withheld from Item No. 3, discussed above.

Item No. 11 "Fred Meikle Personal Financial Statement." This individual, as opposed to corporate, financial statement may be withheld from disclosure in its entirety. The information is exempt from disclosure as personal, private information.

Item No. 12 "Interim Financial Statements 1-26-86 and 10-27-85." These two financial statements utilize the format employed in the Consolidated Financial Statement that is Item No. 3, discussed above. For the same reasons and subject to the same limitations stated in the discussion of Item No. 3, the documents in Item No. 12 partially should be disclosed, but substantial portions may be withheld, as indicated on marked and excised copies submitted with this order, because the withheld information is exempt from disclosure as competitor-sensitive confidential information.

Item No. 13 "Interim Financial Statements Projected through 6-30-86." This one-page, itemized Operating Plan and Income Statement for the year 1986 contains a detailed accounting of projections for sales, costs, gross margin,

expenses and income before tax for the applicant's Portland and Vancouver operations. These portions of the document may be withheld from disclosure, as indicated on marked and excised copies submitted with this order, but these documents otherwise should be partially disclosed to reveal consolidated income before tax, added depreciation, added good will, period cash flow from operations and cumulative cash flow from operations. The information that may be withheld is detailed financial information exempt from disclosure as competitor-sensitive confidential information.

Item No. 14 "Customer/Market Composition." This document partially should be disclosed, but substantial portions may be withheld as indicated on marked and excised copies submitted with this order. The information to be withheld is a customer and market specific listing of sales and percentages of sales by industry category. That information may be withheld as trade secret and competitor-sensitive confidential information.

Item No. 15 "Pro Forma Financial Statistics." This eight-page item includes a cover memorandum discussing and setting out detailed financial information contained in the following seven pages of the Operating Plan. Page 2 of this item is the same document referred to above and discussed as Item No. 13; the eighth page of this item is the same document referred to above and discussed as Item No. 2. For the reasons set out and discussed under Items No. 2 and No. 13, the documents in Item No. 15 partially should be disclosed, but substantial portions may be withheld as competitor-sensitive confidential information. The information to be withheld is specifically indicated on marked and excised copies of the cover memo and the Operating Plan income statements, cash flow statements, balance sheet statements, and short form pro forma financial statistics.

Item No. 16 "Loan Summary - Staff Report." This item is a duplicate of the last five pages of Item No. 5. For the reasons set forth in the above discussion of Item No. 5, the information in Item No. 16, partially should be disclosed, but substantial portions may be withheld, as indicated on copies submitted with this order.

Item No. 17 "Precis of Company Operations." Two three-page memos constitute this item. The memos discuss the feasibility of the applicant's acquisition of Northwest Foundry. These documents, partially should be disclosed, but substantial portions may be withheld as trade secret and competitor-sensitive confidential information. On copies of these documents, we have marked out and excised information relating to management strategy, specific plant production details, specific marketing and pricing strategies and information that relates to profit margins and particular customer groups.

Item No. 18 "Equipment List Appraisal." This fifteen-page appraisal document should be disclosed. The loan applicant does not contend that the document contains trade secret or competitor-sensitive confidential information.

Item No. 19 "Collateral." As with Item No. 18, the listing of the loan applicant's properties in Item No. 19 should be disclosed because the applicant does not contend that trade secret or competitor-sensitive information would be revealed.

We have gone to great lengths in this order to set forth our rationale and to identify exempt and non-exempt information. As we repeatedly mentioned above, we have furnished the department's representative, Mr. MacDougall, with document copies indicating our separations of exempt and non-exempt material. We understand that the petitioner and Mr. MacDougall may have questions and comments about this order. I would be more than willing to discuss this order by phone and to attend when the non-exempt material is made available for inspection.

Very truly yours,

JAMES E. MOUNTAIN, JR.
Special Counsel to the
Attorney General

JEM:cm
cc: Jim Gardner, Attorney at Law
Benny Won, Assistant Attorney General