THEODORE R. KULONGOSKI
ATTORNEY GENERAL

THOMAS A. BALMER
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4400
TDD: (503) 378-5938

December 3, 1993

Steve Mayes
The Oregonian
1320 S.W. Broadway
Portland, OR 97201

Re: Petition for Public Records Disclosure Order
Office of the State Treasurer Records

Dear Mr. Mayes:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on November 24, 1993,[1/] asks the Attorney General to direct the Office of the State Treasurer to make available unedited copies of reports that were prepared by the consulting firm Simat, Helliesen & Eichner, Inc. (SH&E) and relate to the Pacific Aircraft Maintenance Corporation (PAMCORP) hangar project at Portland International Airport.

We are aware that the Office of the State Treasurer has already provided you with copies of the reports you seek, but that those reports were edited in order to delete certain information. You are now seeking the complete reports, including the information that was excised.

In response to your petition for an order requiring disclosure of the excised portions of the SH&E reports, we have contacted, as is not unusual in cases that involve the interests of third parties, a representative of SH&E. We have now been informed that SH&E will assert no proprietary interest or claim of confidentiality in certain of that information for which a trade secret was previously claimed.[2/] Randall Edwards, Executive Assistant, Office of the State Treasurer, has informed us that that office has no interest, other than honoring the trade secrets of its consultant,

in withholding this particular information and, therefore, that this information will be released to you. Accordingly, with respect to this information, we deny your petition as moot.

The remaining information that was excised from the SH&E reports repeats data taken from internal business plans, business projections and similar information provided to SH&E by PAMCORP. This information involves two exemptions in the Public Records Law, as well as the issue of the state's honoring of contractual commitments not to disclose that information unless required by the Public Records Law.[3/]

As part of the original PAMCORP transaction, the parties established that certain information, including trade secrets, supplied by PAMCORP would be treated as confidential to the extent authorized by the Public Records Law. Article I F(14) of the Reimbursement Agreement executed in connection with the Port of Portland Special Revenue Bond transaction states that:

> * * * any information that PERF [Public Employees' Retirement Fund] obtains concerning Barclay or PAMCO[4/] either under this Agreement or due to PERF's participation in the transactions contemplated by the Transaction Documents that would be useful to competitors of Barclay or PAMCO which contains trade secrets or other information considered by Barclay or PAMCO to be confidential shall be kept confidential to the full extent authorized by the ORS 192.501(2) (pertaining to trade secrets), 192.501(16) (pertaining to computer programs and software), 192.502(3) (pertaining to information designated as confidential given to a public body when not required by law), and other provisions of the Oregon Public Records Law that may apply in the particular instance.

This provision resulted from negotiations by which PERF acquired broad rights to inspect, audit and obtain information concerning PAMCORP.

When the Reimbursement Agreement was negotiated, PAMCORP was concerned that information concerning its financial operations, marketing endeavors, potential customers, operational plans, and similar data could, if disclosed, be of significant value to competitors and potential market entrants. Therefore, in exchange for PERF's rights of access to PAMCORP's information and records, the parties

bargained to retain the confidentiality of that information, to the extent authorized by the Public Records Law.

Information of this character in the SH&E reports, supplied by PAMCORP and which concerns PAMCORP's financial status and internal operations, has been withheld from disclosure. That information constitutes either trade secrets of PAMCORP or information submitted by PAMCORP in confidence.

1. Trade Secrets

The trade secret information pertains directly to PAMCORP's proposed work-force salary structure, equipment expenditures, marketing strategies and similar internal operating information. That information establishes PAMCORP's virtual blueprint for entry into the aircraft maintenance industry, and therefore would have significant value both to competitors interested in expanding their aircraft maintenance operations (and thus increasing competition against PAMCORP) and to potential competitors who would consider entering the market. This information clearly constitutes trade secret information under ORS 192.501(2).

Although PAMCORP has suspended its operations, that organization nevertheless continues to exist as a corporate entity, to which the subject information continues to have significant potential value. The corporation still possibly could, for example, use this information to attract a potential investor or purchaser.

For reasons discussed below, we conclude that the public interest does not require disclosure of this trade secret information "in the particular instance."

2. Information Submitted in Confidence

ORS 192.502(3) 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 contract provision quoted above establishes that the information was submitted in confidence, that the information was not otherwise required by law to be submitted and that the state committed, in advance of its receipt of PAMCORP-provided information, not to disclose that information if non-disclosure was authorized by the Public Records Law. The provision specifically refers to the exemption stated in ORS 192.502(3).

A good deal of the excised information, if not in itself a trade secret, would be valuable to potential competitors in the field of aircraft maintenance. Thus, the information should reasonably be considered confidential.

For several reasons, we conclude that notwithstanding the general public interest in the current situation involving PAMCORP, the public interest would suffer by the disclosure of this class of information. First, disclosure in this instance could frustrate the intent of the Legislative Assembly in establishing the exemption provided by ORS 192.502(3). If any degree of public interest in an activity would eliminate the exemption provided by ORS 192.502(3), then persons who deal with public bodies simply will refuse to share with public bodies information that the law does not require them to provide, and the exemption will have no effect.

Second, two public bodies, the Port of Portland and PERF, have interests in maintaining the productive capacity of the newly constructed aircraft maintenance facility, regardless of the resolution of the current PAMCORP situation. Disclosure of this information could result in an increase in competition in the aircraft maintenance industry, to the detriment of the value of the existing facility and the detriment of these public bodies. In the case of PERF, this diminution of the facility's value ultimately would adversely affect beneficiaries of the Retirement Fund.

Third, the extent of the public's interest in disclosure of any particular item of information depends on the magnitude of the public's access to related information concerning the same subject. In light of the substantial amount of statistical information that has been and will be disclosed in response to your records request, we conclude that the public interest does not require either the appropriation by others of PAMCORP's trade secret information or the disclosure of information submitted in confidence.

Accordingly, with respect to the information in the SH&E reports that are either PAMCORP trade secret information or information submitted by PAMCORP in confidence, we deny your petition because we find the information to be exempt from disclosure under ORS 192.501(2) and 192.502(3).

3. Records Not Denied

In reviewing the records for purposes of this order, we have discovered a cross-reference in the SH&E documents that notes the existence of a May 27, 1993, SH&E report that was not present in the state's files at the time of your initial request. We understand that a copy of this report is being provided to the Office of the State Treasurer by SH&E. After receipt of this report, the Office of the State Treasurer will respond to your records request for that document.

Because the Office of the State Treasurer has neither denied nor permitted disclosure of any information in that report, your petition with respect to that document is denied as premature.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the Attorney General

ESH:krg/JAA00F23

cc: Rollie Wisbrock, Chief of Staff
Randall Edwards, Executive Assistant
Office of the State Treasurer

[1/] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

[2/] The "trade secrets" exemption from the public records law exempts from disclosure, "unless the public interest requires disclosure in the particular instance":

> (2) Trade secrets. "Trade secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, * * * 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.

ORS 192.501(2).

[3/] Due to the volume of information addressed by the petition, and because the petition has identified no particular excisions, the issues discussed here necessarily must be stated in somewhat generalized terms, rather than focusing on discrete excised portions of the voluminous records involved.

[4/] The name PAMCO was subsequently changed to PAMCORP.