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August 12, 1997

Susan H. Riley
Manager, Fiscal Services
Oregon State Hospital
2600 Center Street N.E.
Salem, OR 97310

Leslie Lupenko
Corporate Counsel
Andalex Inc., # 400
510 S.W. 3rd Avenue
Portland, OR 97204

Re: **Corrected Copy of Attorney General's Order re:**
Petition for Public Records Disclosure:
Oregon State Hospital Records

Dear Ms. Riley and Ms. Lupenko:

The attached letter is a "corrected copy" of the *Attorney General's Order* which was mailed to you on August 8, 1997. Evidently the date on the first page of that Order was August 4 instead of August 8. We apologize for any inconvenience this may have caused.

Sincerely,

JUDY HAYS
Assistant to the
Deputy and Associate Attorneys General

JAA025AF/jh

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August 8, 1997

CORRECTED COPY TO CONFORM THE DATES

Susan H. Riley
Manager, Fiscal Services
Oregon State Hospital
2600 Center Street N.E.
Salem, OR 97310

Leslie Lupenko
Corporate Counsel
Andalex Inc., # 400
510 S.W. 3rd Avenue
Portland, OR 97204

Re: *Petition for Public Records Disclosure: Oregon State Hospital Records*

Dear Ms. Riley and Ms. Lupenko:

This letter is the Attorney General's order on Ms. Lupenko's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on July 23, 1997,[1] asks the Attorney General to direct the Oregon State Hospital (OSH) to make available certain bid documents submitted by Certified Languages International, L.L.C. (Certified) and Pacific Interpreters, Inc. (Pacific) in response to OSH's request for proposals for credentialed interpreter services. OSH has previously allowed a representative of Andalex, Inc. to view portions of the records, but denied access to certain documents on the basis that the records were considered confidential and exempt from disclosure

[1] We appreciate Ms. Lupenko's extending the time within which the law would have otherwise obligated us to respond.

pursuant to ORS 192.502(3), or otherwise protected as trade secrets pursuant to ORS 192.501(2) and ORS 646.461(4). For the reasons that follow, we grant the petition in part, and deny the petition in part.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. If a public record contains exempt and nonexempt material, the public body must separate the materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

1. **Background**

OSH published a request for proposals for a contractor to provide credentialed interpreter services in multiple languages for interactions between physicians and other therapeutic staff to limited or non-English speaking patients at the Salem and Portland hospital campuses.

In response to the request for proposals, various companies including Andalex, Certified and Pacific supplied documentation to OSH about their proposals, including descriptions of their respective programs, price structure, training and certification of their interpreters. Certain portions of the documentation submitted by Certified, specifically the Interpreter Manager Manual (Parts I, II and III) were marked as proprietary and contained the following statement on each title page:

> Note: All material contained herein is proprietary in nature and is given to the viewer for review only. Any copying of the material, sharing with others, either within the company or to anyone outside the organization viewing this document, without the express written consent of Certified is expressly forbidden.

Documentation submitted by Pacific did not contain any such express language, however, representatives of Pacific have clearly stated to OSH that documents submitted by Pacific are proprietary and should be held confidential. OSH awarded contracts to both Certified and Pacific.

2. **Discussion**

In response to the petition, we have contacted, as is not unusual in cases that involve the interests of third parties, representatives of both Certified and Pacific to substantiate the basis for maintaining the confidentiality of their submissions to OSH. At the outset, we do not agree that documents cannot be considered confidential or otherwise exempt from disclosure merely because OSH did not state in its request for proposals how documents considered proprietary or a trade secret should be submitted. Although it may have been advisable for OSH to inform bidders regarding the confidentiality of documents submitted to it, an agency cannot always predict the nature of materials that are submitted for consideration. Where, as here, an entity submits documents that are either clearly marked as proprietary or trade secret, or otherwise informs the agency which documents should be so considered, so that the agency can reasonably segregate the documents to prevent unintentional disclosure, confidentiality may initially be maintained by the agency. Upon receipt of a records request, the agency then must evaluate the documents to determine if they meet the criteria of the specific exemption claimed.

a. Certified's Documents

Certified asserts that certain documents in its proposal are confidential and contain information that is a trade secret as defined by ORS 192.501(2). ORS 192.501(2) exempts from disclosure trade secrets, which are defined as including, but not limited to

> any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of data 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 users an opportunity to obtain a business advantage over competitors who do not know or use it.

Oregon's version of the Uniform Trade Secrets Act, ORS 646.461(4), also is relevant to our analysis. If information falls within that statute, its "misappropriation" by disclosure is prohibited, ORS 646.463, and the records would be exempt from

disclosure under the Public Records Law by ORS 192.502(8).[2] ORS 646.461(4) defines trade secret as follows:

> Trade secret means information, including a drawing, cost data, customer list, formula, pattern, compilation, program, devise, 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.

Comment b to the Restatement (Second) Torts, § 757 notes that because of the nature of trade secrets, an exact definition is not possible. Courts traditionally examine six factors, based upon the Restatement, in determining whether information constitutes a trade secret: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to safeguard the secrecy of the information; (4) the value of the information to the business or its competitors; (5) the amount of effort or money expended by the business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Citizens' Utility Board v. Public Utility Commission*, 128 Or App 650, 58-59 (1994). Trade secret protection has specifically been extended to instructional methods. *SmokEnders, Inc. v. Smoke No More, Inc.*, 184 USPQ 309 (SD Fla 1974).

Certified's Interpreter Manager Manual contains information on Certified's training program, recruitment of qualified interpreters and extensive documentation of Certified's testing materials, including answer keys, and evaluation guidelines which it utilizes to certify interpreters employed by it. We have been informed by William J. Graeper, Division Manager of Certified, that such information is not known outside Certified's business and is restricted to certain personnel within the business under a confidential relationship. Certified has taken reasonable steps to ensure that the

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[2]ORS 192.502(8) exempts from disclosure "records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law."

confidentiality of its documents is maintained by placing proprietary notices on its documents, limiting the number of copies available and controlling, as well as accounting for, the distribution of each copy.

Mr. Graeper also states that Andalex, a direct competitor of Certified, would obtain an unfair competitive advantage over Certified if the information is disclosed. Certified obviously derives economic value from the procedures it utilizes and has exerted considerable effort and expense to create such procedures as well as protect them from unintentional disclosure.[3]

Except as noted below, we find that Certified's documents constitute trade secrets as defined by ORS 192.501(2) and 646.461(4), and therefore, are exempt from disclosure under ORS 192.501(2) and 192.502(8).[4]

Pages 22-25 of Part II of the Manual are not exempt from disclosure as confidential or trade secret information. These documents are examples of the interpreter training certificates issued to an interpreter upon completion of the training course and are available for public viewing as permitted by the interpreter. Additionally, pages 5-6 of Part III are not exempt from disclosure as Certified is not the original source of the material, and the document is generally available to the public.

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[3]A trade secret owner does not lose it rights by communicating the information to persons, even if many, in confidential relations to itself, under a contract not to make public. *Chicago Board of Trade v. Christie G & S Co.*, 198 US 236, 25 S Ct 637, 49 L Ed 1031 (1905).

[4]Certified also claims that its Manual is exempt under ORS 192.501(4), which exempts from disclosure certain test and examination materials. In the ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1995) at 28, we explain that the "obvious purpose of this exemption is to protect the integrity of examinations administered **by** various **public bodies** for licensing, employment and other purposes." (Emphasis added.) We have not had occasion to consider whether ORS 192.501(4) applies to test and examination materials of entities other than a public body. We need not address this issue here because of our conclusion that the test portions of Certified's Interpreter Manager Manual are exempt from disclosure as trade secrets.

b. Pacific's Documents

None of the documents submitted by Pacific contained a proprietary or trade secret legend, although certain documents bear a copyright mark.[5] Nevertheless, representatives of Pacific have clearly indicated to OSH on several occasions that Pacific considers the documents it submitted in response to the request for proposals as confidential and trade secret information. Specifically, Pacific asserts that it has expended considerable resources to create its unique testing and training materials in which it manifests an intent to remain confidential.

Having reviewed the various documents submitted by Pacific, we find that the Interpreter Training Program manual (Part I and II), Language Proficiency Test, Medical Terminology Manual and test and the Clinical Procedures Manual are trade secrets and exempt from disclosure under ORS 192.501(2) and 192.502(8). These documents contain information on Pacific's training program, testing procedures, including answer keys, instructional material and evaluation guidelines that Pacific uses to train and certify interpreters employed by it. Elizabeth H. Manczak, Vice President and Secretary of Pacific, informs us that such information is not publicly known outside of Pacific's business and that Pacific has made an effort to maintain the confidentiality of these documents. Pacific derives economic value from the procedures it utilizes and exerted considerable effort and expense to create such procedures.

The remaining documents, including Pacific's Employee Manual, are not exempt from disclosure. These documents are either generally known and available to all employees or prospective employees of Pacific, drawn from sources outside of Pacific, or contain information generally known within the industry. Furthermore, it does not appear that these documents have any independent economic value and, therefore, cannot rise to the level of protection as a trade secret and should be disclosed.

For the above reasons, we deny the petition as to those documents submitted by Certified and Pacific that we have found to be trade secrets. As to the remaining

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[5]Affixation of a copyright notice neither waives trade secret protection or estops the owner from asserting trade secret protection for the information the work contains. *See Technicon Medical Information Sys. Corp. v. Green Bay Packaging, Inc.*, 687 F2d 1032, 1037 (7th Cir. 1982), *cert denied*, 459 US 1106 (1983).

documents, we grant the petition and order OSH to disclose the records consistent with this order. The Oregon State Hospital has seven days from the date of this order in which to comply. ORS 192.450(2).

Sincerely,

/s/ Mark Gardner

MARK GARDNER
Special Counsel to
the Attorney General

JAA025AA/MG/jh
c: Warner Allen, Counsel for Certified Languages Int'l, Inc.
Mary Rynerson, President, Pacific Interpreters, Inc.