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May 9, 1995

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The Oregonian
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Paul Elsner, Esq.
Assistant General Counsel
The Port of Portland
P.O. Box 3529
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Re: Petition of Richard Read for The Oregonian dated April 6, 1995 to disclose certain record of the Port of Portland

Dear Mr. Read and Counselor Elsner:

On this public records petition, ORS 192.410 et seq., petitioner Richard Read for The Oregonian requests the District Attorney to order disclosure of applications and supporting and related documents filed by companies wishing to operate and or manage the Portland Ship Yard. Petitioner's petition states in part:

"...the public interest requires...immediate disclosure. These companies are competing to run a public facility, financed by voter-approved bonds...The public should have the opportunity to evaluate the applications, proposals and company information without further delay as Port officials enter negotiations and prepare to submit recommendations to the Port commission."

The Port, by exemption letter dated April 17, 1995, from its counsel, Paul Elsner, Esq., claims that these applications to manage or operate the Portland Shipyard, are exempt from disclosure under ORS 192.501(2) (exempting "trade secret" information); ORS 192.502(3) (exempting confidential disclosures by citizens to public bodies) and ORS 192.502 (15) specifically exempting "records, communications and information submitted to" the Port of Portland and other named agencies). The Port maintains that disclosure of these applications and the information contained therein, could have an adverse impact upon the successful conduct of the chosen applicant and future requests for confidential bidding on Port contracts.

The first of these exemptions ORS 192.501(2), exempting "trade secret" information, is only a conditional exemption which yields to disclosure if "...the public interest requires disclosure in the particular instance[.]" The second exemption, ORS 192.502(3), exempting confidential disclosures by citizens to public bodies, and third exemption, ORS 192.502 (15), specifically exempting certain "records, communications and information submitted to" the Port of Portland and other named agencies, are unconditional exemptions (not subject to the "public interest" balancing test which applies to many other public records law exemptions).

We have examined the records in question and conclude that they meet the description of at least the two cited categories of unconditionally exempt information covered by ORS 192.502(15). This provision of Oregon's public record law which is relied upon by the Port, exempts from disclosure certain classes of "records, communications and information submitted to" the Port of Portland, particularly [as cited by the Port], "Customer lists" (subsection (c)), and "production, sales and cost data" (subsection (e)).¹ It is significant that petitioner acknowledges that at least a portion of this Port exemption applies to the applications submitted. "...It may be that Item 4 on the Port's criteria is exempted by that provision of the law." (emphasis added). Petitioner's concession points out the central relevance of the overall exemption to the submitted applications. Nevertheless, petitioner suggests that of the remaining 7 items of "Evaluation Criteria" could be separated so that financial information could be severed from "other information submitted by the applicants." However, each of these remaining 7 items obligates the applicant to provide the same kind of information which is protected by the exemption.² These remaining 7 items do not lend themselves to such selective application as suggested by petitioner. Review of each applicant's proposal, as requested by the Port, clearly reveals to this office, contents which constitute "records, communications and information" submitted to the Port which is privileged from disclosure under Oregon Public Records law. ORS 192.502(15). Because this office concludes that all information and data submitted to the Port constitutes public records which are unconditionally protected as exempt from disclosure, further discussion of the conditional "trade secrets" exemption or unconditional confidential disclosures exemption, is not necessary.

¹ This exemption also covers, in subsection (F), "Marketing strategy information that relates to applicant's plan to address specific markets and applicant's strategy regarding specific competitors[.]" This additional section, although not cited by the Port, would appear to have relevance, equal to those sections cited by the Port.

² Each applicant has been asked to submit a proposal that addresses certain Evaluation Criteria. The Evaluation Criteria is broken down by section, which are: (1) Operational and management background and objectives; (2) Guaranteed financial return to the Port; (3) Length of initial contract term; (4) Financial strength; (5) Environmental and safety compliance; (6) Absence of contingencies; (7) Percentage or volume-based rent; (8) Acceptance of Port contract terms. Each of these sections contain additional descriptive requirements.

Page 3
Richard Read
Paul Elsner, Esq.

Petitioner's public records request is not the first instance in which this office has noted the apparent application of this exemption from disclosure of public records regarding similar Port data and information as provided by ORS 192.502(15). Once again, the conclusion in this case is one that is not reached without hesitation. Oregon public records law provides this unconditional exemption to government agencies, including the Port of Portland, as named in ORS 192.502(15) because of their similar nature: they all pursue, as their primary or at least an important mission, the provision of assistance to various businesses or commercial entities whose success is helpful to the Oregon business climate, e.g....the state Economic Development Commission, the Economic Development Department, the Oregon Resource and Technology Development corporation and the Economic Stabilization and Conversion Fund. The purpose of the exemption seems to be to protect from automatic disclosure those kinds of records, communications and information submitted, including financial statements, customer lists, production, sales and cost data; and marketing strategy, etc..., which a private business might be required to submit to one of these government agencies in order to obtain assistance from, or to do or conduct business with, most likely in the nature of obtaining financing, procuring loans or negotiating or receiving services, from the listed governmental agencies. Because the "records, communications and information" in this instance are sensitive business information submitted to the Port of Portland in order to obtain a contract to manage and or operate the Port Ship repair facility, these applications are unconditionally exempt from disclosure.

However troubling it is to some that these application/proposals and information contained therein may not be available for public review and dissemination, the plain language of this exemption applies. Petitioner is reminded that this office must follow the law and what this office deems to be a conscientious reading of Public Records law, even when by operation of such "unconditional" exemptions, the public's interest, by law, can not be considered, weighed or taken into account. It is apparent that when the legislature created this privilege for these few governmental agencies, it determined that the public's interest in disclosure was to be of less importance than the confidentiality of records, communications and information provided to these governmental agencies. This office can not take the liberty of rewriting, second guessing or ignoring public policy as embodied by this Oregon law. If petitioner believes that the law is wrong, then petitioner should ask the legislature to reconsider the creation of unconditional exemptions from public record disclosure, as has occurred in this instance.

Thus, this office must defer to a court of law the interpretive question, whether an exception should be justified for records and information like those involved. This office would urge the petitioner, should it genuinely believe that this office had erred in this analysis, to remove this issue to a court of law where the matter may be reviewed de novo upon filing of a circuit court action under the public records law. In such a legal action the Port would be free to assert any exemption claim, whether or not such an exemption has been specifically considered before by the District Attorney. ORS 192.490(1).

Page 4
Richard Read
Paul Elsner, Esq.

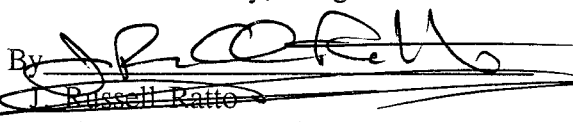
ORDER

Accordingly, it is now ordered that the petition of Richard Read for The Oregonian dated April 6, 1995 to disclose the described record of the Port of Portland is denied. This order does not bar petitioner from its option of seeking judicial review as noted for disclosure, in the Circuit Court for Multnomah County, pursuant to ORS 192.450(2), 192.460, 192.490.

Very truly yours

MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

By



~~Russell Ratto~~

Senior Deputy District Attorney

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