



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

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Senior Deputy City Attorney
Office of City Attorney
1221 SW 4th Avenue, Suite 430
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Re: Petition of Steven Schell received November 18, 2004, to disclose certain records of the City of Portland

Dear Mr. Schell and Mr. Walters:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Steven Schell on behalf of his client Brummel Construction requests the District Attorney to order the City of Portland and its employees to produce the following records:

1. **Copies of quarterly, annual, and/or general reports submitted by Heiberg Garbage & Recycling (“Heiberg”), the franchisee for solid waste, recycling and yard debris collection under Ordinance No. 176687, to the City of Portland pursuant to Section 6.8 of the Ordinance.**
2. **Copies of franchise and hauler records, financial forms, invoices submitted, and canvassing records relating to Heiberg.**

The written request for the documents was submitted on October 4, 2004 to Bruce Walker, Manager, Solid Waste & Recycling Division of the Office of Sustainable Development. Darian A. Stanford, attorney for Heiberg, filed a written objection to the request with the City Attorney's Office.

Benjamin Walters, Senior Deputy City Attorney, responded to the request in a November 2, 2004 letter. Mr. Walters identified three sets of documents within the scope of the request: non-exempt materials (which were disclosed), material that is partially exempt from disclosure, and documents that are wholly exempt from disclosure. Mr. Walters claimed exemptions as trade secret information, ORS 192. 501(2), and business records submitted for the calculation of fees, ORS 192.502(5).

In the petition, Mr. Schell argues that District Attorney Michael Schrunk's July 29, 1994 decision is binding in this case. He states that the Heiberg documents are not exempt trades secrets.

This office reviewed the various documents with Deputy City Attorney Walters. There are three sets of documents claimed as exempt as trade secrets: the quarterly (residential) customer count report, the quarterly gross residential revenue report, and the yearly detail cost report for residential solid waste and recycling franchise. There are two sets of reports for which both exemptions are claimed: the quarterly invoice for collections fees (covering both the residential franchise fee and the commercial permit fee) and the monthly recycling report (again covering both residential and commercial material).

DISCUSSION

I. Trade Secrets.

ORS 192.501(2) conditionally exempts:

Trade Secrets. "Trade secrets," as used in this section, may include, but are not limited to, any 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[.]

The City points out that some of the documents include "annual detailed residential franchise cost reports and quarterly reports containing information on business revenues, can counts, labor hours and tonnage amounts." Further, some of the requested documents contain "sensitive, non-patented business and commercial information otherwise known only to certain individuals within Heiberg."

Mr. Stanford, speaking for Heiberg, notes that ORS 192.501(2) provides a relatively broad definition of "trade secret" and maintains that the compilations of financial information in the reports "plainly have at least *potential* commercial value." He argues that giving Brummel Construction access to the Heiberg reports would result in unfair competition.

This office has taken a consistent position on this exemption that is both narrow and focused. We rejected the exemption with respect to documents detailing estimated annual revenues/expenses included in the Portland Family Entertainment proposal for renovation of Civic Stadium (August 12, 1999 order on petition of The Oregonian). We accepted the exemption with respect to the non-patented processes, procedures, testing data, and mechanisms of a device provided to Metro in an application for a grant (February 24, 2003 order on petition of Stephen Crew).

Here, there is nothing to aid us in differentiating between information used by the city in determining the grant of a residential franchise or in setting residential fees or the cost of a commercial permit. The documentation is, to a great extent, a factual account of the collection of garbage and recycling and its distribution to a recycling center or to a landfill. Some of the reports mix residential and commercial information and only one is marked confidential.

It may be necessary for Heiberg to segregate the materials it believes must be protected as trade secrets and provide it to the city in a separate confidential report. The public good would then be served by making available to anyone only the information necessary to insure both the city and the garbage services are acting in the public interest. The various quarterly and yearly reports apparently provided by all residential and garbage services as required by the Office of Sustainable Development do not qualify as trade secrets.

II. Business Records Required to be Submitted.

ORS 192.501(5) conditionally exempts:

Information consisting of production records, sale or purchase records or catch records, or similar business records of a private concern or enterprise, required by law to be submitted to or inspected by a governmental body to allow it to determine fees or assessments payable or to establish production quotas, and the amounts of such fees or assessments payable or paid, to the extent that such information is in a form which would permit identification of the individual concern or enterprise.

The City does not seek application of this exemption for information provided by Heiberg as part of the fee setting for residential franchises. It is accepted that the 1994 order of this office required the disclosure of those documents. Rather, Deputy City Attorney Walters argues that certain commercial permit information falls outside the order and should be exempt. He notes that such documents "include invoices for the amounts of commercial permit fees payable to the City by

Heiberg Garbage & Recycling and quarterly tonnage reports used by the City to determine the amount of the commercial tonnage fees.”

The petition specifically requests the reports submitted by Heiberg under Ordinance No. 176687. The documents are described as “the annual financial reports submitted by the franchise residential solid waste haulers.” The second request is for “hauler records” and “invoices” that arguably would include information that must be provided under the City Code for the determination of the cost of a commercial permit. The latter request is outside the scope of the 1994 order of this office.

We have extensively reviewed the 1994 order that dealt with a request for “the most recent annual financial reports submitted by the franchised residential solid waste haulers.” The residential solid waste franchise ordinance of 1991 spells out the financial information that must be reported. Included in the required “Allowable Expenses” report is “any revenues derived from nonresidential selection services.” The financial reports in question in the 1994 petition were all related to the setting of residential franchise fees and were, accordingly, ordered to be disclosed.

There are three sets of documents under consideration in this order that are similar in nature to those described in the 1994 order: the quarterly gross residential revenue report, the quarterly customer count report, and the annual detail cost report for residential solid waste and recycling franchise. Petitioner is correct that these reports are not subject to the business report exemption as determined in our 1994 order and should be disclosed.


Petitioner was provided with a redacted copy of the monthly recycling report. Omitted from disclosure were the tonnage figures for commercial operations. Deputy City Attorney Walters has advised us that his client has assured him that the tonnage figures are not used either directly or indirectly in the calculation of residential franchise fees. We have also reviewed the quarterly invoice for collection fees and charges. This document contains both residential and commercial tonnage figures. Again, Mr. Walters has advised us that his client said the commercial tonnage figures are not involved in any way with the setting of residential franchise fees.

The commercial tonnage figures are clearly business records that are required to be filed by the City. No public interest has been presented that would overcome the application of the exemption. The redaction in the monthly recycling reports was correct. The quarterly invoice reports should also be redacted to exclude the commercial tonnage figures.

ORDER

Accordingly, it is ordered that the City of Portland promptly disclose the records sought in the petition subject to the redaction of the commercial tonnage figures in the two sets of documents noted above. Disclosure of the documents ordered is subject to payment of the City of Portland's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440 and this order.

Very truly yours,


MICHAEL D. SCHRUNK
District Attorney

NOTICE TO PUBLIC AGENCY

Pursuant to ORS 192.450(2), 192.460 and 192.490(3) your agency may become liable to pay petitioner's attorney fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within 7 additional days thereafter.

cc: Darian A. Stanford