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February 24, 2003

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Attorneys at Law
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Portland, OR 97209

Marvin D. Fjordbeck
Senior Attorney
Office of Metro Attorney
600 NE Grand Ave
Portland, OR 97232

Re: Petition of Stephen Crew received January 9, 2003, to disclose certain records of Metro

Dear Mr. Crew and Mr. Fjordbeck,

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Stephen Crew on behalf of his client Jeffrey Soule requests the District Attorney to order Metro and its employees to produce the following records:

Complete file/files related to Mursen Environmental and grant awarded to Mursen Environmental by Metro, including all notes and correspondence.

Mr. Soule submitted his written request for the documents on October 24, 2002. According to Mr. Crew, Metro provided copies of some of the records but that "significant portions of the records were redacted" on the ground that the documents were exempt as trade secrets under ORS 192.501(2). This office was provided with the redacted records in six sections labeled by petitioner as Exhibit 1, pages 1 through 59. Page 1 is a log of "Documents withheld from Production" consisting of technical drawings, notes and test results, and four pages of financial documents for the ten months ending October 31, 2001.

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Mr. Crew argued in the petition that the records of Mursen Environmental were not and could not be 'trade secrets' under ORS 192.501(2) because trade secrets refer to information "which is not patented." Since Mursen received a patent for "The Spinner," the records were not, by definition, trade secrets. Mr. Crew contended that even if the records were trade secrets, it was still in the public interest to disclose the information since it involved the expenditure of public monies to a private concern.

Senior Metro Attorney Marvin Fjordbeck responded to the petition on January 15 and claimed exemption under ORS 192.501(2), Trade Secrets, and ORS 192.502(4), Confidential Submissions. Mr. Fjordbeck indicated "the grant applicant involved in this matter, Mursen Environmental, Inc., may provide you with additional information or legal argument concerning this matter." Metro provided an unredacted version of the documents together with the documents withheld from production.

Christopher Wright, attorney for Mursen Environmental, submitted comments and legal argument in a January 28 letter. He took the position that "the public does not have the right to confidential proprietary information of a private company." With respect to the trade secret/patent argument of Mr. Crew, he pointed out that the withheld material "contains information on improvements and other areas outside the patent itself." Mursen has developed and incorporated numerous improvements in The Spinner "since receiving the patent that are not covered by the existing patent." The items of commercial value include detailed drawings of the device in late 2001 and early 2002 and updates on the project and the device. Mr. Wright took the position that the "only information that has been withheld from Petitioner is that information specific to the engineering of the device, particular test results, and financial information of the company." Further disclosure would "compromise Mursen's competitive position in the market."

Mr. Wright noted that the information was submitted to Metro voluntarily in relation to an application for a grant. He asserted the confidential submissions exemption and said that Mursen entered into a confidentiality agreement with Metro "regarding all the information provided by Mursen to Metro." Disclosure of such information would have a chilling effect on other companies seeking funds from Metro. Mr. Wright also contended in his January 28 letter that the financial information was not, in fact, subject to the Public Record's law since "Mursen voluntarily provided Metro with financial information to update Metro on the status of the project."

Mr. Crew responded in a February 3 letter and argued that Metro, not Mursen, should have to demonstrate that disclosure would cause harm to the public interest. He rejected the "chilling effect" contention and noted the strong presumption in favor of disclosure. Mr. Crew did acknowledge that his client had "little interest, if any, in Mursen product drawings." Of strong interest, however, was the disclosure of the names of Mursen investors. Mr. Crew asserted that his client believed that "there are public officials and/or regulators who have invested in the company" and that it would be harmful to the public interest not to disclose such information.

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On February 7, Mr. Wright submitted to this office a seven-page signed confidential Grant Contract entered into by Metro and Mursen on January 14, 1999. Attached was a signed one-page extension with a termination date of February 28, 2001. Mr. Wright reiterated his "chilling effect" argument and pointed out that Mursen is a closely held S-corporation "not required to reveal the identities of its investors." He pointed out that there are adequate laws that require financial disclosure of public officials and asserted that petitioner "is using the public disclosure laws as part of a larger pattern of harassment of Mursen."

On February 18, this office received a final letter from Mr. Crew. He took the position that the submission of Mursen's documents to a public agency made them public records. Mr. Crew argued that Mursen's citation to various exemptions for financial documents (not applicable in this petition) "conclusively demonstrates that there is no such exemption for such materials submitted to Metro." He also contended that the Grant Contract is not in fact a confidentiality agreement. Finally, Mr. Crew asserted the public's right to know "how its investment is doing."

DISCUSSION

I. Public Record.

ORS 192.410(4) provides:

"Public record" includes any writing containing information relating to the conduct of the public's business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.

Christopher Wright, on behalf of Mursen, has asserted in both his January 28 and February 7 letters that financial records were provided to Metro with the understanding they would be returned to Mursen and that "Metro was bound to return any such financial information after its review." At this point in time, Metro has for whatever reason "retained" the financial documents identified as October 2001 income and balance sheets and the Income Statement for three months ending March 31, 2002. The documents must be dealt with in this order as the "public records" of Metro.

II. Trade Secrets.

ORS 192.501(2) conditionally exempts:

(2) 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

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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[.]

There are numerous references to processes, procedures, testing data, mechanisms, etc. throughout the redacted and withheld materials in the possession of Metro. These materials are outside the information contained in the patent and are subject to the trade secret exemption. This office reviewed the United States Patent 6,135,374, filed October 8, 1999 (available on the Internet).

To the extent the materials submitted to this office can be identified as "trade secrets," we have been unable to find any "public" interest in their disclosure. Thus, it is simply a question of separating the exempt records from general information supplied by Mursen.

Petitioner's exhibit page number identifies the documents below. The total number of actual pages is noted. A general description of the particular document or section redaction will be supplied to the extent necessary to explain its inclusion or exclusion as a trade secret. All records noted with a "(yes)" are found to be exempt as trade secrets.

Redacted Documents

Part 1 – July 1998 Grant Application (Exhibit pp. 1-27) – 37 pages

- Ex. p. 8 - Financial history (no)
- Ex. p. 10 - Costs of prototype (yes)
- Ex. p. 12 - Objective 1 (no)
- Ex. pp. 15-18 – How much material; Chart; Source of material (no)
- Ex. p. 20 - Process (no)
- Ex. pp. 21-22 - Criteria (yes); Testing (no); Design change (no)
- Ex. pp. 23-24 - Marketing strategy, targeted market, competition, pricing strategy (yes)
- Attachment I - Prototype phases (yes)
- Attachment II - Project history and company timeline (no)
- Attachment III - (not provided)

Part 2 – December 2000 Project Update (Exhibit pp. 28-31) – 14 pages

- Ex. p. 30 -
 - Sec. 5 Seven challenges (yes) except first paragraph (no)
 - Sec. 6 Miscellaneous changes (yes)
 - Sec. 7 Design of the cleaning and electrical system (yes) except the first and second paragraph but for the name references (no)
 - Sec. 8 Shell design (no section)
 - Sec. 9 Where are we now (no)

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Ex. p. 31 - Three pages of drawings (yes); two-page patent letter (no)

Part 3 – September 5, 2001 Bullet Summary letter (Exhibit pp. 32-33) 2 pages

Ex. pp. 32-33 - Sec. 5 b, c, d, e, f, and i design, marketing, and testing (yes); Sec. 5 g and h (no)

Part 4 – February 2001 Project Update (Exhibit pp. 34-35) 2 pages

Ex. 34-35 - Testing section and water section (yes)

Part 5 – July 2000 Progress Report (Exhibit 36-40) 5 pages

Ex. pp. 37-38 - 1998-1999 Design, testing methods, and results (yes)

Ex. pp. 39-40 - 1999-2000 Research information, design, results (yes) except section under “Immediate future” (no)

Part 6 - March 2002 Final Report (Exhibit 41-47) 18 pages

One page email to Meg Lynch - re: final report (no)

Ex. p. 41- Goal 1.1.2-1.1.4 (no)

Ex. p. 42 - Goal 1.2 (no); Goal 2 (yes)

Ex. pp. 43-44 - Goal 3.2 (yes); Goal 3.3 (no)

Ex. pp. 44-45 - Goal 4.3 (no)

Ex. pp 45-50) - Goal 5.1.1, 5.1, 5.2, 5.3, 6, 7, 8, 9, and 10 (yes)

One page email to Meg Lynch – re: financials (no)

One page Memo to Meg Lynch – re: financials (no)

Three page financial statement for three months ending March 31, 2002 (no)

Documents Withheld From Production

November 1998 device test results (yes)

July 1999 Notes re technical performance of device (yes)

October 2001 income and balance sheets (no)

Device design drawings (yes)

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III. Confidential Submissions.

ORS 192.502 (4) exempts:

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.

Mursen Environmental, Inc. submitted a business grant application (Part 1 of the redacted documents) with Metro in July 1998. Accompanying the application was a request for confidentiality; some of the included documents were stamped "CONFIDENTIAL." Unfortunately, there is no indication that Metro obliged itself not to disclose the information. Therefore, the confidential submissions exemption is not available for this material.

On January 14, 1999, a Grant Contract between Mursen and Metro became effective. A contract extension changed the termination date to February 28, 2001. In addition, the Grant Contract contemplated the delivery of a final report documenting the activities in the agreement.

Section 5b of the agreement provides that

Metro will take all reasonable precautions, including but not limited to preparation and execution of confidentiality agreements, necessary to protect from disclosure any proprietary information, trade secrets, and other information considered confidential by Mursen.

This provision, although ambiguous, is sufficient to satisfy the requirements of the confidential submissions exemption for all materials dating from January 1999 through March 2002 (the date of the final report). Mursen, therefore, provided to Metro during the period covered by the contract Parts 2 through 6 of the redacted documents as well as the withheld October 1991 financial material.

The "trade secret" information noted in Section II also constitutes confidential submissions. The October 2001 income and balance sheets and the five pages of financial documents at the end of the March 2002 Final Report also qualify as confidential communications. No other confidential submissions were identified in the redacted material.

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Petitioner has asserted that the public "is entitled to know who is receiving public funds; who is benefiting from public funds; and how public funds are being spent." More specifically, petitioner contends that some of the Mursen investors may be "public officials and/or regulators which have invested in the company" which "could somehow be harmful to the public interest." Petitioner is free to take his suspicions to the Metro President or the Metro Auditor. A public records petition is not the proper forum for exploration of such accusations.

This office concludes that the public interest would be harmed by disclosure of either the trade secret information or the income and balance sheets. It would have a chilling effect on the frank submission of sensitive technical data and financial information to Metro. Such documentation is essential to Metro's necessary oversight of the public's money and evaluation of the quality of the product (or service) and the financial strength of companies such as Mursen Environmental.

ORDER

Accordingly, it is ordered that Metro promptly disclose the redacted records sought in the above petition as follows:

Part 1: ex. p. 8; ex. p 12; ex. pp. 15-18; ex. p. 20; ex. pp. 21-22 testing and design change sections only; Attachment II. Part 2: ex. p. 30 Sec. 5 first paragraph only, Sec. 7 first and second paragraph only except name references, and Sec. 9; ex. p. 31 two-page letter only. Part 3: ex. pp. 32-33 Sec. 5 g and h only. Part 5: ex. pp. 39-40 immediate future section only. Part 6: one-page email to Meg Lynch, ex. p. 41 Goal 1.1.2 -1.1.4; ex. p. 42 Goal 1.2; ex. pp. 43-44 Goal 3.3; ex. pp. 44-45 Goal 4.3.

Disclosure of the documents ordered is subject to payment of Metro'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

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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: Christopher Wright

03-02