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July 17, 2001

Nigel Jaquiss
Willamette Week
822 SW 10th Ave.
Portland, OR 97205

James Kirk
Director and General Counsel
Port of Portland
121 NW Everett
Portland, OR 97209

Re: Petition of Mr. Jaquiss for the release of public records

Dear Mr. Jaquiss and Mr. Kirk:

After due consideration and for the reasons expressed in this letter our office has decided to grant the request for release of the audited 2000 financial statement of Cascade General/Portland Shipyard LLC, currently in the possession of the Port of Portland.

BACKGROUND

The public records request in this case arises from a controversial privatization of public assets by the Port of Portland. Intense public scrutiny and mounting criticism surrounded the Port's decision to sell the 57-acre Swan Island ship repair yard to Cascade General/Portland Shipyard LLC, a private business, in August, 2000. Criticism of the arrangement was heightened in April, 2001 when Cascade General, only eight months after acquiring the shipyard, decided to sell off its primary asset, Dry Dock No. 4, which had been financed in 1976 with \$84 million in public funds. Media coverage of these events has been extensive, with each of Portland's major newspapers devoting front-page articles to the story, beginning at the time of the proposed sale in the late 1990's.

As presented in the media, the facts of the shipyard sale raise numerous questions about the Port of Portland's stewardship of public assets and real property and about the business practices of Cascade General. The Port, in fact, concedes that the sale of the shipyard generated "significant public interest" and that the subsequent sale of the dry dock "prompted intense and appropriate public scrutiny."

THE RECORDS REQUEST

The records. Mr. Jaquiss, a reporter for the Willamette Week newspaper, has requested the release from the Port of the audited 2000 financial documents of Cascade General. The records are in the possession of the Port for a number of reasons. First, they are required by contract to calculate the lease payment rate of Cascade General for the period of time in 2000 prior to the August sale when Cascade was leasing the facility from the Port. Second, they are required to determine financial payments for an unsecured \$5.7 million promissory note due in 2009, owed by Cascade to the Port for the purchase of the facility. Finally, they are required by the Port to monitor the compliance of Cascade General with another term of the shipyard sale, the \$2.5 million environmental cleanup obligation of Cascade.

The petitioner's request. Mr. Jaquiss indicates that he intends to use these figures in pursuing his investigation of the shipyard sale, an investigation that has resulted in a number of articles in his newspaper over the last three years.

The Port's response. Ms. Cory Streisinger has responded by claiming that the documents are exempt from public disclosure under two sections of the public records law, as trade secrets, ORS 192.501(2), and as information submitted in confidence, ORS 192.502(4). Ms. Streisinger points to the sale agreement in which the "Port agrees to keep such information confidential to the extent permitted by law." Both of these exemptions contain a public interest component requiring an evaluation of the effect of the exemption on the public interest. Ms. Streisinger expresses the opinion that public interest factors might well have required the release of the requested documents prior to the sale of the Dry Dock No. 4 in April of this year. With the sale complete and the dry dock now gone the position of the Port is that the public interest in this information has diminished to the point that the exemption would apply.

On July 16, 2001 the new Port of Portland general counsel James Kirk¹ asserted an additional claim for exemption under ORS 192.502(16). The claim was that, although the exemption was "not as clear as one might like," according to Mr. Kirk, the documents appear to fall under the category of exempt economic development information.

¹ On July 13, 2001 Ms. Streisinger resigned her position as general counsel for the Port of Portland and James Kirk assumed that function.

DISCUSSION

1. Trade secrets.

The public Oregon records law exempts from disclosure records which qualify as trade secrets "unless the public interest requires disclosure in the particular instance." Trade secrets under ORS 192.501(2)

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 initial inquiry must be to determine whether these requested records should qualify as trade secrets. Exemptions from public records disclosure are presumptively inapplicable. 2000 ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL, p. 18. When seeking an exemption from disclosure laws a public agency must overcome this presumption. ORS 192.490(1); *Coos County v. Dept of Fish and Wildlife*, 86 Or App 168 (1987). In this case the Port must demonstrate that these documents constitute trade secrets. The Port was unable to provide information on why these documents would constitute trade secrets other than to indicate generally that private businesses often consider such documents to be trade secrets. This was apparently so because the Port was not privy to the specific purposes for which Cascade used the information internally, purposes which would determine whether the definition of trade secret applied.

A July 16 letter from Steven Wilker, counsel for Cascade General, addresses the issue. It details the many investments, sales, concessions, bids and insurance consequences of the release of such documents and concludes that such financial statements are the "lifeblood" of the corporation, closely guarded by a core of management agents. The analysis convinces us that these records should be considered trade secrets.

Assuming that these documents do constitute trade secrets, however, the trade secret exemption of ORS 192.501(2) applies only if the public interest does not require disclosure. Here we respectfully disagree with the position taken by the Port. The public interest in this issue, far from diminishing since the sale of Dry Dock No. 4, appears as strong as ever. Indeed, the front-page headline article of the July 10 edition

of the Portland Tribune concerns a legislative tax exemption enjoyed by Cascade General during the five years that they leased the shipyard from the Port, an exemption promoted by the Port which saved Cascade General \$7 million. The article includes an extensive synopsis of the controversial shipyard and dry dock sales. It again raises questions of the Port's stewardship of public assets and potential business favoritism.

In short, we agree with the Port's analysis that these business transactions have produced significant public interest. We feel, however, that this interest is a continuing interest and compels disclosure of the requested documents. The public interest in obtaining information about the dealings of public agencies extends beyond the point when decisions are made by public officials. Citizens have an interest in examining the decisions of public agencies even when the consequences of those decisions, as here, are established. We conclude, consequently, that the public interest does require the release of these records.

2. Confidential information

ORS 192.502(4) 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.

All of the requirements for this exemption are met, save for the public interest component. Having determined above that, as trade secrets, the public interest **requires** that these records be disclosed, it is illogical to imagine that the public interest would also **suffer** from their actual disclosure. Unless the public interest would suffer from disclosure the exemption under ORS 192.502(4) is inapplicable.

3. Economic development information

Finally, the Port has claimed that the requested documents are exempt under ORS 192.502(16), a section of the public records law which exempts certain documents provided to public economic development agencies, including the Port of Portland, "by applicants for investment funds, loans or services including, but not limited, to...

- (a) Personal financial statements
- (b) Financial statement of applicants...
- (c) Production, sales and cost data..."

The 1999 Legislature altered this exemption, emphasizing the obvious intent of this statute to protect the application process for loans or investments from public agencies to private lenders for purposes of economic development.²

The business conducted by the Port is generally not applicable to this process. As emphasized by Mr. Kirk, the Port of Portland "traditionally (does) not provide 'investment funds, loans or services.'" The Port appears to concede that the specific wording of this statute may not be directly applicable to its business arrangements with Cascade General, but argues that under the general heading of the exemption, "economic development information," the business arrangements with Cascade General can be considered an economic development project. As an economic development project, it is argued, financial reports provided to the Port qualify for an exemption under ORS 192.502(16).

Regardless of whether one considers the shipyard sale to Cascade as a type of investment because it includes a promissory note as partial payment for the purchase, it is clear that the requested documents constitute more than records of an **applicant** for such a loan. As noted, one of the purposes for which Cascade was required to provide this financial information was to monitor the lease payments for the rental agreement which existed prior to and apart from the sale of the shipyard. As such, Cascade General was a **tenant** and not an **applicant** for investment funds, loans or services. For this reason alone the exemption does not apply and it is unnecessary to consider the further claims under this exemption.

² The precise meaning of ORS 192.502(16) had been a subject of debate. The wording of the statute had linked the covered records to loans and services described in ORS 285A.224, the Economic Stabilization and Recovery Act. The Attorney General, however, interpreted this not as a limitation, but concluded that any records listed in ORS 192.502(16) were exempt if submitted to the agencies listed in that section. 1999 ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL, p. 66. In 1999, however, the Legislature addressed the ambiguity by changing the term "by applicants for loans or services described in (ORS 285A.224)" to "by applicants for investment funds, loans or services including, but not limited to, those described in ORS 285A.224." While this effectively uncouples the ORS 192.502(16) exemption from a strict limitation to those records provided pursuant to ORS 285A.224 it also emphasizes the fact that the Legislature, having reconsidered the scope of this exemption, has limited it to **applicants**.

ORDER

Accordingly, it is now ordered that the petition of Nigel Jaquiss for the Willamette Week, dated July 5, 2001 is allowed.

Very truly yours,


MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

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 seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.

Cc: Steven Wilker,
Attorney for Cascade General

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