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February 15, 2001

Cory Streisinger  
Director & General Counsel  
Port of Portland  
121 NW Everett  
Portland, OR 97209

Steven M. Wilker  
Attorney at Law  
Tonkin Torp LLP  
1600 Pioneer Tower  
888 SW Fifth Avenue  
Portland, OR 97204

Re: Petition of Steven M. Wilker on behalf of The Business Journal of Portland, Inc. and staff writer Shelly Strom, received February 6, 2001 to disclose certain records of the Port of Portland

Dear Ms. Streisinger and Mr. Wilker:

#### BACKGROUND

On February 1, 2001, Shelly Strom of the Business Journal of Portland requested the Port of Portland (Port) to produce the following record:

1. **A faxed letter from Evergreen America Corp. relating to Evergreen's planed suspension of container vessel calls in Portland.**

Port Director and General Counsel Cory Streisinger responded on the same day in a letter denying the request. Ms. Streisinger claimed the record was exempt from disclosure as a confidential communication under ORS 192.502(4). The trade secrets exemption and the economic development exemption were also put forward as possible grounds for nondisclosure. Ms. Streisinger noted that the letter sent to the Port "is clearly marked, in large bold-faced type, <<STRICTLY CONFIDENTIAL>>." The two-page letter was submitted to this office under separate cover for our confidential review.

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In his petition, Mr. Wilker argued that the confidential communication exemption did not apply. He questioned whether the confidentiality requirement was met and whether the public interest would be harmed by disclosure of the Evergreen letter:

The public has an interest in knowing --if not an affirmative right to know--the reasons that a major customer of a public resource is choosing not to do business with the public body entrusted with the management of that resource. That is especially true here, where the Port has made statements about why Evergreen is suspending operations. If the Evergreen letter is consistent with the reasons stated by the Port publicly, then the Port's argument on channel deepening will arguably be enhanced. On the other hand, if the Evergreen letter does not rely on or downplays channel deepening as a reason for the suspension of its container vessel calls at the Port, then the public has an interest in knowing that as well, even if it does embarrass the Port or diminish its argument in support of the controversial channel deepening project.

Petitioner rejected the Port's contention that the document was submitted as "marketing strategy information that related to [Evergreen's] plan to address specific markets and [Evergreen's] strategy regarding specific competitors." Petitioner rejected the possible trade secret exemption on the basis that "[i]here has been no indication that any of the information in the Evergreen letter would satisfy" the criteria of that conditional exemption.

Ms. Streisinger submitted a letter response to the petition on February 8. She related that Port management employees met with Evergreen representatives and had a follow up telephone conversation regarding "future vessel calls in Portland." The Evergreen representative advised the Port that it was Evergreen's policy

not to provide public statements regarding business decisions of this type; that in view of the relationship between the Port and Evergreen, Evergreen would be willing to provide a written explanation for the Port's internal information only; but that the document could not be used or disclosed publicly.

The Port argued in its response that disclosure of this confidential information would cause harm to the public interest. The Port believes that

its relationship with Evergreen now and in the future, and with other customers as well, would be seriously harmed if customers could not submit to the Port confidential explanations of their business decision-making and expect them to be treated with the confidentiality they deserve. This, in turn, would harm the public by

making the Port less able to carry out its statutory mission of serving the maritime, aviation, commercial and industrial interests of the tri-county port district.

The Port also asserted that the Evergreen letter contained trade secrets and marketing strategy information.

Petitioner submitted a letter response to the Port's arguments on February 8. With respect to the confidential information exemption, petitioner argues that the "reasons that a customer of a public resource has given to the public body for suspending its business with the public body are not the kind of information that should be kept confidential." He contends that the Port's argument with respect to the public interest is "based on a fundamentally false premise." The Port "wants to be treated as if it is not a public body charged with the operation of a public resource for the public benefit."

In response to a request from this office, petitioner provided newspaper articles from The Oregonian (January 24 edition) and from the Portland Tribune (February 13 edition) which contain public statements of Port officials and spokespersons on the Evergreen suspension of operations.

## DISCUSSION

### **I. 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 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 Port contends that the information in the Evergreen letter "has commercial value, in that it references the factors leading to a key business decision on Evergreen's part and describes Evergreen's strategies for the future." While we accept the Port's general characterization of the letter, we could find no "trade secret" information of potential commercial value other than possibly the date of suspension of service. According to the Portland Tribune article, Evergreen has publicly announced the date of its final call in Portland. The Trade Secrets exemption does not apply.

## II. Economic Development Information.

ORS 192.502(16) exempts:

The following records, communications and information submitted to the...Port of Portland or other ports, as defined in ORS 77.005, by applicants for investment funds, loans or services including, but not limited to, those described in ORS 285A.224:

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(f) Marketing strategy information that relates to applicant's plan to address specific markets and applicant's strategy regarding specific competitors.

Ms. Streisinger included with her response our January 31, 1995 order denying the Business Journal's petition for certain Trailblazer monthly financial reports submitted to the Port. This office accepted the broad interpretation by the Attorney General of the Economic Development Information exemption and upheld the application of two other provisions listed in ORS 192.502. Again, we have thoroughly reviewed the Evergreen letter and conclude that the marketing strategy provision urged by the Port is not applicable. There is some general reference to addressing markets in the letter. There is not, however, any discussion that can be characterized as Evergreen's strategy regarding specific competitors. The reason for providing the letter to the Port was "simply as a courtesy" to explain its business decision.

## 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.

We accept the Port's representations that the letter was submitted in confidence and that the Port obliged itself in good faith to treat it as confidential. The letter itself is marked <<STRICTLY CONFIDENTIAL>>" and there is no mention of the written correspondence in the public statements attributed to Port officials and spokespersons in either newspaper article provided to us.

There is little in the contents of the writing itself to explain the continued reluctance of Evergreen America Corp to authorize the Port to publish the letter now that Evergreen has announced its suspension of operations in June. Nonetheless, the Port has related Evergreen's position that the letter "has been provided to the Port contrary to Evergreen's normal policy..."

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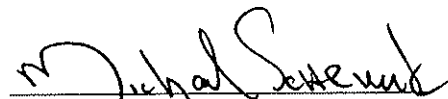
The harm to the public interest is a difficult matter to resolve. It is clear that the Port would suffer embarrassment and have its integrity questioned by Evergreen and other shippers if its word could not be relied upon. On the other hand, misrepresenting Evergreen's position in an attempt to foster support for deepening the Columbia River channel would certainly not be in the public interest. The question then is whether the Evergreen letter is demonstrably inconsistent with the public pronouncements of the Port.

The difficulty in resolving this issue is that the Port advises us that much of its knowledge of Evergreen's explanation for leaving the Port comes from verbal communications outside the confines of the Evergreen letter. We are comfortable saying that the public statements attributed to the Port are indeed referenced in the Evergreen letter. Further, there is nothing in the letter that causes this office to question the integrity of the Port in its representations to the Business Journal or to this office. Disclosing the requested document would harm the public interest. We therefore conclude that the Evergreen letter was appropriately provided to the Port of Portland in confidence and that the exemption applies.

ORDER

Accordingly, it is ordered that the petition of Steven Wilker on behalf of Shelly Strom and the Business Journal of Portland to disclose certain records of the Port of Portland is denied.

Very truly yours,



MICHAEL D. SCHRUNK

District Attorney  
Multnomah County

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