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August 5, 2003

Gail Kinsey Hill
Business Reporter
The Oregonian
1320 SW Broadway
Portland, OR 97201-3499

Benjamin Walters
Senior Deputy City Attorney
City of Portland
Office of the City Attorney
City Hall, Suite 430
1221 SW 4th Avenue
Portland, OR 97204

Re: Petition of Gail Kinsey Hill for The Oregonian received July 24, 2002 to disclose certain records of the City of Portland

Dear Ms. Hill and Mr. Walters:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Gail Kinsey Hill requests the District Attorney to order the City of Portland to provide the following records:

[D]ocuments pertaining to the city's offer to purchase Portland General Electric from Enron Corp. and documents Enron sent to the city in response to its offer.

On July 2, 2003, Ms. Hill requested a copy of documents outlining and detailing the City's offer to purchase Portland General Electric (PGE) and/or its assets from Enron Corp. She also requested any and all documents Enron sent to the city in response to its offer. Ms. Hill received a response from Senior Deputy City Attorney Benjamin Walters in a July 9 letter with an attached six-page unsigned "confidentiality agreement."

Mr. Walters asserted three exemptions: 1) trade secrets under ORS 192.501(2), 2) information regarding the purchase of electric services under ORS 192.502(25), and 3) confidential submissions under ORS 192.502(4).

The City responded to the petition in a July 30 letter to this office, citing the same exemptions. Mr. Walters included a copy of City Council Resolution No. 36093, "creating a task force under the direction of the Office of Management and Finance" with directions to monitor City options, undertake discussions with Enron, and otherwise carry out the public interests of the City and PGE ratepayers. Mr. Walters noted the City "has not revealed the content of any City discussions with Enron" and has complied with the terms of the confidentiality agreement. Mr. Walters submitted eight sealed confidential documents for our review. Michael Morgan, an attorney for Enron, submitted a confidential letter as well.

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 advised petitioner the documents she sought "contain sensitive business and commercial information" meeting the requirements of the trade secrets definition. In its letter response to this office, the City stated the information involved "particularized commercial and financial information about a particular business, PGE, regarding its potential market value as an on-going business operation."

The Attorney General's Public Records and Meetings Manual, 2001, p. 30, recommends that "...public bodies that anticipate receiving some trade secret information in response to a request for proposal or other bidding request should specify in their solicitation documents that any trade secret information must be specifically identified as such...." Although the PGE bid originated from the City here, the rationale certainly applies to the bid response from Enron. Unfortunately, there is no indication in the confidential documents themselves that the transmission of trade secrets was a subject of discussion or concern.

The City did not identify in its response what documents (or portions of documents) are the "trade secrets" in question. Mr. Morgan, for Enron, provided some direction in his communication, but again pointed to no particular "trade secrets" for our review.

This office is not in a position to speculate what “compilation of information” having “actual or potential commercial value” should be the subject of redaction, since the entire series of communications cannot be considered a trade secret. The City has not made a case for this exemption.

II. Purchase of Electric Services

ORS 192.502(25) exempts:

Sensitive business, commercial or financial information furnished to or developed by a public body engaged in the business of providing electricity or electricity services, if the information is directly related to a transaction described in ORS 261.348, or if the information is directly related to a bid, proposal or negotiations for the sale or purchase of electricity or electricity services, and disclosure of the information would cause a competitive disadvantage for the public body or its retail electricity customers. This subsection does not apply to cost-of-service studies used in the development or review of generally applicable rate schedules.

The City outlined in its letter to this office the various electricity and electricity service operations engaged in by the City. Mr. Walters advised petitioner that the confidential documents “contain sensitive business and commercial information that was furnished to, or developed by the City, that relate to a possible transaction involving the electric services and electricity supplied by Portland General Electric Company.”

The exemption is a narrow one designed to protect sensitive information, if it is “directly related to a bid, proposal or negotiations for the sale or purchase of electricity or electricity services.” That is not the case here. The City was bidding for the purchase of PGE itself. The exemption is simply not applicable to the negotiations between Enron and the City.

III. Confidential Submissions

ORS 192.504(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.

As stated in the Attorney General's Public Records and Meetings Manual, 2001, p. 64, there are "no less than five conditions that must be met" for the exemption to apply:

1. The informant must have submitted the information on the condition that the information would be kept confidential.
2. The informant must not have been required by law to provide the information.
3. The information itself must be of a nature that reasonably should be kept confidential.
4. The public body must show that it has obligated itself in *good faith* not to disclose the information.
5. Disclosure of the information must cause harm to the public interest.

Petitioner contends that the City has failed to establish the exemption on at least two counts. With respect to the third requirement, petitioner argues that "[i]t is not 'reasonable' that information regarding the purchase of Oregon's largest utility by the City of Portland, a public entity, be kept from citizens, especially those served by the utility and the city." Mr. Walters responds, "[i]nformation regarding a privately owned business that is offered for sale is of the type that is reasonably expected to be kept confidential." The City is correct.

Petitioner takes the position that "disclosure of the records certainly would not harm the public interest. PGE ratepayers and the citizens of Portland and of Oregon should know details of the negotiations between Enron and the City." The City argues that "[w]hether or not the City ultimately acquires PGE, the sale process remains on-going. The denial of confidentiality during the negotiation process and before a final transaction is agreed to will make it more difficult for the City and other public bodies to engage in other future negotiated transactions with private entities."

Mr. Walters points out that "the final terms of any mutually agreed upon transaction by which the City were to acquire PGE would be required to be authorized by an ordinance of the City Council passed at an open Council hearing." He provides the assurance that "[a]ll of the particulars would be subject to inspection. The process of approving the final terms of this transaction would be open to public scrutiny and debate."

In 1999, this office ordered the disclosure of documents protected under a confidentiality agreement between the City and PFE for the purchase of Civic Stadium. "We believe that the people have the right to know how their tax dollars have been spent and will be committed in the future." If the City had been successful (or ultimately is successful) in its bid to purchase PGE, there is little question the public interest would be best served by the disclosure for public review and scrutiny all correspondence both to and from the City.

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Significantly, Enron is still actively reviewing bids under its "modified auction process." Moreover, it is still possible the City might bid again for the assets of PGE prior to the distribution of PGE stock to Enron creditors. The City was given certain prerogatives in the negotiations with Enron in recognition of its public status. It is clear, however, the confidentiality agreement was an important precondition before Enron would undertake frank and open discussions with the City. In addition, there are other affected private and public entities as well as contracts and franchises that impact the continued need for confidentiality.

Under the City Council Resolution, there is a continuing duty on the part of the Mayor and the Commissioner of Public Works to scrutinize the activities of Enron in its disposition of PGE. That can only be done effectively under the umbrella of the confidentiality agreement. Otherwise, the City would be on the outside looking in. Under these circumstances, the public interest would be harmed by the premature disclosure of the documents sought by petitioner.

ORDER

Accordingly, it is ordered that the petition of Gail Kinsey Hill for The Oregonian to disclose certain records of the City of Portland is denied.

Very truly yours,


MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

Cc: Michael M. Morgan

03-08