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January 31, 1995

Rachel Zimmerman
Reporter, The Business Journal
10 NW 10th Avenue, Suite 200
Portland, OR 97209

Paul Elsner, Esq.
Assistant General Counsel
The Port of Portland
P. O. Box 3529
Portland, OR 97208

Re: Petition of Rachel Zimmerman for The Business Journal
Dated December 15, 1994 to disclose certain records of
the Port of Portland

Dear Ms. Zimmerman and Counselor Elsner:

On this public records petition, ORS 192.410 et seq., petitioner Rachel Zimmerman for The Business Journal requests the District Attorney to order disclosure of monthly financial reports submitted to the Port by Trailblazers, Inc., under a five-year contract whereby the Trailblazers have a concession to manage and promote the sale of advertising at the Portland International Airport by businesses seeking patronage from persons using the airport facility. (In fact, petitioner authored a news report concerning the progress of the Trailblazers effort in The Business Journal, Week of December 23, 1994, at page 14). Petitioner's petition states in part: "Because the Port of Portland is a public agency and held an open bidding process for this project, I believe the public has the right to know how much the concessionaire working out of a public agency, is making. I need this information in order to do a thorough analysis of the ad campaign and the agreement between the Blazers and the Port."

The Port, by exemption claim letter dated December 23, 1994 (supplemented by a further letter of January 9, 1995), from its counsel, Paul Elsner, Esq., claims that these monthly financial reports of the advertising concession are exempt from disclosure under ORS 192.502(15) (specifically exempting certain records of the Port of Portland and other named agencies); and ORS 192.501(2) (exempting "trade secret" information). The Trailblazers organization supports this exemption claim by letter dated January 6, 1995 from Michael V. Fennell, Esq., Vice President and General Counsel. Both the Port and the Trailblazers Corporation maintain that disclosure of this alleged trade secret information could have an adverse impact upon

the successful conduct of the advertising concession and thus indirectly perhaps limit or reduce the potential fees which the Port might receive for this use of the advertising spaces at the airport. Under the contract, the Port is guaranteed \$450,000 revenue yearly (\$37,500 per month), minimum or 28% (first year) and 25% (remaining years) of the gross receipts of sales of advertising space, whichever is greater.

The first of these exemptions, ORS 192.502(15), is an unconditional exemption (not subject to the "public interest" balancing test which applies to many other public records law exemptions). The second exemption, ORS 192.501(2), exempting trade secret information, is only a conditional exemption which yields to disclosure if "...the public interest requires disclosure in the particular instance [.]"

We have examined the records in question and conclude that they answer the description of at least one or two of the categories of unconditionally exempt information covered by ORS 192.502(15). That provision exempts certain classes of records of certain named government agencies, specifically including the Port of Portland, particularly "Customer lists" (subsection (c)), and "Production, sales and cost data" (subsection (e)). Petitioner disputes that this exemption is applicable at all, because an introductory phrase of the exemption refers to information submitted "...by applicants for loans or services described in ORS 285.120...." -- the state Economic Stabilization and Conversion Fund -- and these records are not, of course, records submitted to that Fund. However, we accept the advice given by the Attorney General that the reference to that Fund is disjunctive and does not limit the application of this exemption respecting the various other government agencies named in ORS 192.502(15).

"Legislative history reveals that the phrase '...by applicants for loans or services described in ORS 285.120...' was not intended as a limitation on the application of this exemption. Any of the listed records submitted to the listed agencies are exempt from disclosure." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1993), at 50.

Consequently, we conclude that this unconditional exemption protects these records from disclosure. For that reason, further discussion of the conditional "trade secrets" exemption is not necessary.¹

¹ We reach this conclusion not without some hesitation: What all of the government agencies named in ORS 192.502(15) seem to have in common is that they all pursue, as their primary or at least an important mission, the provision of assistance to various businesses or commercial entities whose success is helpful to the Oregon business climate, e.g. the state Economic Development Commission, the Economic Development Department, the Oregon Resource and Technology Development Corporation and the already-mentioned Economic Stabilization and Conversion Fund. The purpose of the exemption seems to be to protect from automatic disclosure those kinds of financial statements, customer lists, etc., which a private business might be required to submit to one of these government agencies in order to obtain a loan, service or other benefit of the kind these government agencies provide. Arguably, the records petitioner seeks here are not very relevant to that purpose, because they are not sensitive business information submitted to the Port in order to obtain the five-year contract awarded to the Trailblazers; and the concession in question operates entirely upon government-owned property -- a situation probably not typical of the loans, services or other benefits provided by the government agencies named under this exemption. However, the plain language of the exemption appears to cover these records and we will, therefore, have to defer to the courts of law the interpretive question whether an exception should be justified for records like these.

Page 3

Rachel Zimmerman

Paul Elsner, Esq.

ORDER

Accordingly, it is now ordered that the petition of Rachel Zimmerman for The Business Journal dated December 15, 1994 to disclose the described records of the Port of Portland is denied. (Petitioner has, of course, the option of seeking judicial review of the disclosure question in the Circuit Court for Multnomah County, ORS 192.450(2), 192.460, 192.490).

Very truly yours,

151

MICHAEL D. SCHRUNK
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Multnomah County, Oregon

cc: Michael V. Fennell, Esq.
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