



ROD UNDERHILL, District Attorney for Multnomah County

1021 SW 4th Ave., 600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

May 18, 2015

Lane Toensmeier
General Counsel
Amalgamated Transit Union, Division 575
1801 NE Couch Street
Portland, OR 97232

Kimberly Sewell
Director Legal Services
TriMet
1800 SW 1st Avenue, Suite 300
Portland, OR 97201

Re: Petition of Amalgamated Transit Union, Division 757 for Disclosure of Towers
Watson Compensation Survey Data

Dear Mr. Toensmeier and Ms. Sewell:

After due consideration, and for the reasons expressed in this letter, my office denies Amalgamated Transit Union, Division 757's ("ATU") request for an order compelling TriMet to disclose Towers Watson survey data.

Background

TriMet contracts with Towers Watson, an international professional services company, to purchase access to a survey database that provides compensation data ("CompSource"). On its website, Towers Watson claims that CompSource "is recognized worldwide as the most reliable source of data for compensation planning." Access to CompSource is subject to the "Terms of Use" and the "Data Services Terms and Conditions," which provide that the surveys are the intellectual property of Towers Watson and are not subject to disclosure outside of the agreements:

[u]nder no circumstances may you make access to the Web Tool available to any third party, or share surveys (in whole or in part) with any such third party, including without limitation, any entity controlling, controlled by or under common control with your company, Towers Watson's competitors and/or independent contractors working solely for your company without Towers Watson's prior written consent. Surveys may not be reproduced in employee newsletters or posted on your company's intranet. Your company shall be

responsible for ensuring compliance with the terms of this agreement by any such third party.

Seeking access to this data, ATU requested disclosure of the Towers Watson “compensation/salary study” related to TriMet’s non-union positions. Pursuant to its contractual obligations, TriMet asked Towers Watson for permission to disclose the surveys. Towers Watson denied TriMet’s request, prompting TriMet to object to disclose pursuant to ORS 192.501(2) (trade secret) and ORS 192.502(4) (confidential submission).

Trade Secrets Exemption

A. Towers Watson’s Survey Data Satisfies the Statutory Definition of Exempt Trade Secrets

ORS 192.501(2) defines and provides for the conditional exemption of trade secrets from disclosure:

Trade secrets... 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 have a business advantage over competitors who do not know or use it. *Id.*

Because the requested records meet all four criteria set forth, they can be withheld from disclosure as trade secrets. Towers Watson’s data is not patented, but it is proprietary, reflecting processes and information developed from its work directly with employees in industries across the country. As evidenced by the Terms of Use and Data Services Terms and Conditions, it closely guards the confidentiality of the data it develops, limiting disclosure without permission beyond a select few within an organization. Towers Watson charges its customers, including TriMet for the use of its data and therefore it has commercial value. Moreover, this proprietary information gives Towers Watson an advantage over competitors that do not know or use it.

In denying a petition for disclosure in a similar case, the Attorney General looked to the courts for further guidance in defining trade secret. *Public Records Order, August 8, 2007, Kirsch*. Citing *Citizens’ Utility Board v. Public Utility Commission*, 128 Or App 650 (1994), the AG endorsed a six factor test that overlaps with the definition of “trade secret” in the Public Records Law: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to safeguard the secrecy of the information; (4) the value of the information to the business or its competitors; (5) the amount of effort or money expended by the business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Id.* at 658-59.

The AG’s Order in *Kirsch* is analogous and dispositive. In that case, Larry Kirsch requested the opportunity to inspect and copy rate filing documents submitted to the Insurance Division (Division) by Regence Blue Cross Blue Shield (Regence) in support of their proposed

rate increase for individual health plans. Included in the submission were documents regarding Regence's claim trends, retention, target loss ratio and accidental death benefit rates that the Division considered to be Regence's trade secrets and therefore exempt from disclosure. Mr. Kirsch's wife, Karen Kirsch, petitioned the Attorney General for an order directing the Division to disclose the documents.

The AG denied the petition, finding that the requested data were proprietary trade secrets. The AG found that the information was developed by and known only to Regence. The information had economic value for Regence and disclosing it to competitors "would provide them with an economic advantage in that they would be able to use the information in formulating their own rates without having to expend the costs of compiling and analyzing the data." *Id.* at 3. Likewise, Towers Watson's data, developed by its own efforts and known only to its paying customers, has economic value precisely because it is not made publicly available.

B. Public Interest Does Not Compel Disclosure

While this office agrees with ATU's assertion that "the compensation of TriMet's executive staff is highly relevant to the public discourse," it does not follow that the public interest in compensation compels disclosure of Towers Watson's underlying data. Given the interplay with the Oregon Uniform Trade Secrets Act (ORS 646.461(4)), which prohibits the "misappropriation" a trade secret and provides civil sanctions for such misappropriation, the Attorney General cautions public bodies not to release any trade secret information without determining that the public interest requires disclosure, and sets forth a "heightened" standard for this analysis:

We believe that by retaining the conditional exemption for trade secrets when it enacted the UTSA, the legislature acknowledged a public interest in the nondisclosure of trade secrets. As a result, we believe it is appropriate to give heightened scrutiny to contentions that the public interest requires the disclosure of trade secrets. *Attorney General's Public Records and Meetings Manual* (2014) at 41.

Here, applying the heightened scrutiny standard, it does not follow that vigorous and effective public discourse requires access to all the factors considered when setting non-union compensation. TriMet salaries are themselves publicly available and can be compared with those of other non-union employees in other transit operations in other cities. Public interest does not require disclosure of trade secrets merely because that data could make salary comparisons easier. Moreover, public interest would not be served by overriding Towers Watson's efforts to protect its data. Towers Watson, and other private companies, would decline to do business with public entities if the consequence was public disclosure of proprietary information.

Confidential Submission Exemption

In order to encourage submission of information to public bodies, ORS 192.502(4) exempts from disclosure information submitted to a public body in confidence. For the exemption to apply, five conditions must be met:

- 1) The informant must have submitted the information on the condition that it 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.

Manual at 83.

ATU takes issue only with the third condition, arguing that TriMet offers no authority that the Towers Watson survey contains information that should be kept confidential. We find that Towers Watson data, collected through comprehensive and costly surveys and provided to paying customers for their use only is “of a nature that reasonably should be kept confidential.”

First, the economic viability of Towers Watson requires data are available to paying customers only. Towers Watson would not be able to provide resources to public bodies, if by doing so they risked making public that for which customers have to pay.

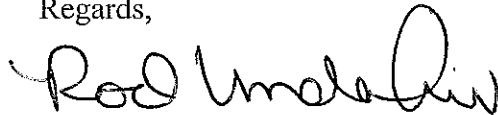
Second, Towers Watson demands confidentiality from its customers. As evidenced by the Terms of Use and Terms and Conditions attached to TriMet’s response, Towers Watson requires subscribers to keep its data confidential. It expressly provides that the information be used “only within [the subscribing] company for internal human resources planning” and cannot be modified, copied, sold, transferred or made available to any third party. In response to ATU’s request, TriMet did seek permission to disclose the requested data in accordance with its agreement with Towers Watson; however, the request was denied.

Finally, TriMet treats the data as confidential in its normal course of business. Only three TriMet employees can access the survey data, and they are each assigned unique usernames and passwords. TriMet and Towers Watson treat this information as confidential and have satisfied the criteria for exemption under ORS 192.502(4).

Conclusion and Order

Accordingly, the petition of ATU is denied.

Regards,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is fluid and cursive, with a large initial "R" and "U".

ROD UNDERHILL
District Attorney
Multnomah County, Oregon