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February 25, 1994

Steve Mayes, Reporter
The Oregonian
1320 S. W. Broadway
Portland, OR 97201-3499

Paul Elsner, Esq.
Assistant General Counsel
The Port of Portland
P. O. Box 3529
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Re: Petition of Steve Mayes for The Oregonian Dated November 15, 1993 to Disclose Certain Records of the Port of Portland

LETTER DECISION AND ORDER

Dear Mr. Mayes and Counselor Elsner:

1. The petition and exemption claims.

On this public records petition, ORS 192.410 et seq., petitioner Steve Mayes, as reporter for The Oregonian, requests the District Attorney to order The Port of Portland to disclose "An appraisal of Pacific Aircraft Maintenance Corp. performed for the Port by Cushman and Wakefield of Oregon Inc." By exemption claim letter dated December 3, 1993, from the Port's Assistant General Counsel, Paul Elsner, Esq., the Port claims that this appraisal document is exempt from disclosure under ORS 192.501(2) (the "trade secrets" exemption), and ORS 192.501(6) (exempting information relating to the appraisal of real estate prior to its acquisition).[1]

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[1] A third ground of exemption considered by the Port, ORS 192.502(3) (exempting certain confidential disclosures by citizens), apparently is not actively asserted by the Port. The Port's exemption claim letter variously states that the Port will not be presenting argument relevant to the confidential citizens disclosure exemption; and that "...the Port is no longer making a claim of exemption under the terms of ORS 192.502(3)...." However, a third party -- Cushman and Wakefield (hereafter, C&W), the company which prepared the appraisal in question -- has submitted a letter argument dated December 13, 1993 from its

2. The factual background and the nature of the appraisal document in question.

Preliminary to our discussion of the exemptions claimed by the Port, it is necessary to explain the factual background out of which this appraisal document arises and the nature of the appraisal document itself, as relevant to our consideration of the public interest factor which is controlling upon these exemptions.

Petitioner asserts (and the Port does not dispute) that the Port of Portland issued $50 million worth of special obligation revenue bonds to finance construction of an aircraft maintenance facility upon land owned by the Port at the Portland International Airport. Under an agreement negotiated by the Port with a newly-established business,

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[FOOTNOTE 1 - CONT'D]
counsel, Rhonda W. Kennedy, of the Kennedy and Kennedy law firm, which argues that the confidential citizen disclosures exemption is applicable in this case.

Generally, this office will not consider a ground of exemption which is not asserted by the public agency whose records are the subject of the public records petition. However, as we see it, the considerations presented by C&W substantially address the same "public interest" balancing test which is common to all three of these conditional exemptions under the public records law. Thus, we have given full consideration to C&W's views as bearing upon the resolution of the "public interest" factor relevant to the "trade secrets" and "real estate appraisal" exemptions asserted by the Port. In the particular circumstances of this petition it does not appear that our final resolution of this petition would be any different if the "confidential citizen disclosures" exemption had been formally invoked by the Port.

Of course, if our resolution of this petition is unsatisfactory to either party, the issue would be reviewed de novo upon filing of a circuit court action under the public records law and the Port would be free to assert any exemption claims, whether or not they were specifically considered before the District Attorney. ORS 192.490(1).

Pacific Aircraft Maintenance Corporation (Pamcorp)[2], that company was to construct a complete complex, including hangars and related buildings, to operate an aircraft maintenance and repair operation at the airport site. The $50 million revenue bonds issue was the key financial component necessary to finance the construction and initial operation of the aircraft maintenance facility.

By negotiation between the Port and the Oregon State Treasury Department, acting on behalf of the Public Employees Retirement System (PERS), PERS agreed to supply a critical guarantee of payment of the bonds to be issued. PERS administers the retirement system for public employees, holds the corpus of accumulated retirement funds, and provides retirement income for all retired Oregon state employees and many local government employees whose retirement is covered by the PERS system. Thus, this large amount of public funds became liable to pay off the bonds under the PERS guarantee, if revenues from the aircraft maintenance operation proved to be insufficient for that purpose.

As part of the information which the Port considered in order to decide the feasibility and the financing of this project, the Port commissioned an appraisal by the private firm of Cushman and Wakefield (C&W). Petitioner alleges that the Port paid $18,000 for this appraisal, captioned: "APPRAISAL OF REAL PROPERTY/PAMCO Aircraft Maintenance Facility/Air Trans Center/Portland International Airport, Portland, Multnomah County, Oregon, as of June 1, 1992." Some information based upon this appraisal document apparently also was provided to the state Treasury Department during the negotiations which led to the agreement for the $50 million guarantee of the bonds provided by PERS. The appraisal document is substantial, consisting of approximately 238 printed pages. The Table of Contents discloses discussion of such subjects as: area analysis (of the geographical area in which the facility was to be sited), market analysis, property description, real property taxes and assessments applicable, zoning regulations, the highest and best use of the property,

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[2] Although the company apparently was called "Pamco" at an earlier point, it is now known as "Pamcorp." The basic historical facts of the Port - Pamcorp - PERS agreement are outlined in the letters submitted by the parties on this petition and in articles published in The Oregonian, Sunday, January 9, 1994, at page A1; and Wednesday, February 2, 1994, at page B1.

C&W's valuation process, cost approach valuation, income approach valuation, and various certifications, qualifications and limiting conditions; together with nine Addenda relating to subjects such as: comparable airport facilities, comparable land sales, construction specifications, copies of zoning regulations, a survey of investors, a list of C&W's clients served in the past, etc.[3] Essentially, the purpose of the appraisal was to arrive at a reasonably accurate estimate of the value of the property as it would be when developed according to Pamcorp's plan -- so that the Port and potential financial backers could determine the viability of the project and the amount of financing needed.

Pamcorp was, as previously observed, a newly-established company. After PERS approved the guarantee of the bonds, the bonds were issued, Pamcorp built the planned facility and commenced aircraft maintenance operations in July of 1993; but abruptly closed operations in October, 1993 in obvious financial straits. According to petitioner's information (published in The Oregonian article February 2, 1994, see, footnote 2 supra), the cost of maintaining the facility now is about $450,000 per month "in its mothballed state," of which $400,000 per month is payment on the bonds. Allegedly, there is a reserve account to continue these payments for about five more months, after which PERS may have to call upon retiree pension funds to fulfill its guarantee. The same article reports that the State Treasurer, Jim Hill, has announced that the state has agreed to buy Pamcorp's assets at the airport, with the idea that the property is marketable as an aircraft maintenance facility and may be returned to operation if a qualified operator can be found. Thus, it would appear that this appraisal document still has continuing potential relevance as an indicator of the value and future prospects of the aircraft maintenance facility already constructed at the airport complex.

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[3] We do not, of course, disclose any particulars relating to these subjects in this letter order. However, as the Court of Appeals itself has observed, it is virtually impossible to render a reasoned opinion upon a public records disclosure question without giving some description of the nature of the document under review, e.g., Turner v. Reed, 22 Or App 176, 180, n.3, 537 P2d 1174 (1975).

Critically important to the Port's exemption claims is Limiting Condition No. 3 set forth at pages 106-7 of the appraisal document, which for purposes of this letter decision needs must be set forth in full:

> "The Appraisal is to be used in whole and not in part. No part of the Appraisal shall be used in conjunction with any other appraisal. Possession of the Appraisal, or a copy thereof, does not carry with it the right of publication. Publication of the Appraisal or any portion thereof without the prior written consent of C&W is prohibited. Except as may be otherwise expressly stated in the letter of engagement to prepare the Appraisal, C&W does not permit use of the Appraisal by any person other than the party to whom it is addressed or for purposes other than those for which it was prepared. If written permission is given by C&W to use the Appraisal, the Appraisal must be used in its entirety and only with proper written qualification as approved by C&W. No part of the Appraisal or the identity of the Appraiser shall be conveyed to the public through advertising, public relations, news, sales or other media or used in any material without C&W's prior written consent. Reference to the American Institute of Real Estate Appraisers or to the MAI designation is prohibited." (Emphasis added).

Petitioner strongly argues his case that the public interest weighs in favor of disclosure of this appraisal document because it may have been a key factor in the decision to enter upon this project, which has involved the commitment of considerable public funds, but apparently has experienced significant difficulties in the execution. This brings us, then, to the consideration of the exemption claims asserted by the Port.

3. The trade secrets exemption, ORS 192.501(2), and the Uniform Trade Secrets Act (of 1987), ORS 646.461 et seq.

We first consider the "trade secrets" exemption invoked by the Port. Our analytical task is complicated by the enactment in 1987 of the Uniform Trade Secrets Act, ORS 646.461 et seq., whose precise relation to the pre-existing public records law "trade secrets" exemption, ORS 192.501(2), apparently has not yet been determined by any appellate case law of Oregon. The Attorney General's advice upon this subject seems to be somewhat equivocal.

"The relationship between the treatment of trade secrets under ORS 192.501(2) and under the Uniform Trade Secrets Act is not entirely clear. ORS 192.501(2) authorizes, but does not require, a public body to refuse to disclose a trade secret, unless the public interest requires otherwise in a particular case. On the other hand, the Uniform Trade Secrets Act prohibits 'misappropriation' of a trade secret, and provides civil sanctions for such misappropriation. ORS 646.463 and 646.465. We believe that by retaining the conditional exemption for trade secrets, and at the same time enacting the Uniform Trade Secrets Act, the legislature has, in effect, called for heightened scrutiny of contentions that the public interest requires the disclosure of records asserted to be trade secrets.

"If an agency's disclosure of a trade secret would constitute 'misappropriation' under the Trade Secrets Act, disclosure would be prohibited both under the Trade Secrets Act and under the 'catch-all' exemption of ORS 192.502(8). However, the Uniform Trade Secrets Act also provides immunity from a claim or action for misappropriation in cases where the information is released under an order issued under the Public Records Law or on the advice of an attorney authorized to advise the public body. ORS 646.473(3). A public body should not release any trade secret information without a determination that the public interest requires disclosure, and without first consulting with an attorney authorized to give it legal advice." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (November, 1993), at 20. (Emphasis added).[4]

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[4] The cited "catch-all exemption," ORS 192.502(8), provides that: "The following public records are exempt from disclosure under 192.410 to 192.505 [the public records law]:...Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." (Emphasis added). This cross-reference incorporates into the public records law exemptions approximately 267 limitations of access to public records scattered throughout the statutes outside the public records law. See, ATTORNEY GENERAL'S MANUAL, supra, at 45-47, and Appendix H, at 117-128 (table of miscellaneous restrictive statutes).

Thus, it appears that the Attorney General is not entirely certain whether the legislature meant to continue the "conditional" nature of the trade secrets exemption, whereby a trade secret always would be subject to disclosure if the public interest weighed in favor of disclosure, or rather perhaps intended that at least some trade secrets -- namely, those "misappropriated" -- would be unconditionally exempt from disclosure. (We revert to this question again in part 3.2 below). Accordingly, we must address the following three questions.

3.1 Is this appraisal document a trade secret? In 1987 the Legislative Assembly both amended the definition of a trade secret in the public records law trade secrets exemption, ORS 192.501(2), and at the same session enacted a somewhat different definition of a trade secret in the Uniform Trade Secrets Act (UTSA), ORS 646.461 et seq. As amended by Oregon Laws 1987, Chapter 764 (SB 219), Section 2(2), ORS 192.501(2), the public records law exemption, now reads:

> "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[.]" (Emphasized portion shows modification of the prior, superseded section).

ORS 192.501(2) was enacted "in lieu of," former ORS 192.500(1)(b). A comparison of the former, superseded section on trade secrets shows that it is identical to ORS 192.501(2), except that the phrase following the word "within" (as emphasized above) replaced this prior wording of the same phrase: "...a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service or to locate minerals or other substances, having commercial value...." The amended phrase in ORS 192.501(2) clearly appears to broaden the scope of the exemption by: (1) replacing a "commercial concern" with an "organization" (suggesting that the organization need not be "commercial", in the usual sense of that term, e.g., a non-profit organization); (2) deleting reference to fabricating,

producing or compounding an article of trade or a service, or locating minerals or other substances, in favor of simply "using" the trade secret in a "business it conducts,"; and (3) broadening "having commercial value" to "having actual or potential commercial value." (Emphasis added).

The Uniform Trade Secrets Act (UTSA), ORS 646.461 et seq., enacted at the same 1987 session, sets forth a somewhat different, but largely overlapping, definition of a trade secret:

> "'Trade secret' means information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique or process that:
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> (a) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
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> (b) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." ORS 646.461(4).

We do not consider that the mere fact that C&W "disclosed" its appraisal document to its customer, the Port, deprived the appraisal document of any "trade secret" character which it otherwise would have. Presumably, the whole point of having a public records law trade secrets exemption is that the legislature recognizes that valuable trade secrets are, in fact, disclosed to government agencies in a number of different contexts which do not thereby automatically deprive them of their character as trade secrets. [5]

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[5] Consistent with our perception on this point, the office of the Attorney General in a public records letter order dated December 3, 1993, in response to a petition by this same petitioner relating to certain information concerning this same Pamcorp facility financing issue, denied disclosure of the information sought on the ground that it did constitute a trade secret, even though the Port had shared the information in question with the state Treasury Department and PERS during the negotiations which resulted in the Pamcorp revenue bonds guarantee.

We conclude that this appraisal document (or at any rate, the bulk of it), does constitute a trade secret under either the public records law or the UTSA definitions. Under ORS 192.501(2), the appraisal document is a "plan" or "compilation of information" which is not patented, known only to certain individuals, used for a business advantage having actual or potential commercial value. Under the UTSA, ORS 646.461(4), this appraisal document does constitute "information" or a "compilation" that derives independent economic value, actual or potential, from not being generally known to the public and has been the subject of reasonable efforts under the circumstances to maintain its secrecy.[6] We pass, then, to the second question.

3.2 Is the "trade secrets" exemption still a conditional exemption (dependent upon evaluation of the "public interest" factor), notwithstanding passage of the Uniform Trade Secrets Act (in 1987)? Prior to the legislative action taken in 1987, the public records law exemption for "trade secrets" clearly was conditional, exempting a trade secret from disclosure "...unless the public interest requires disclosure in the particular instance[.]" (Emphasis added). ORS 192.501. Generally, the many exemptions from disclosure contained in the public records law are either "conditional" (usually dependent upon the "public interest" factor), or "unconditional", i.e., unqualifiedly exempt from disclosure. See discussion in, ATTORNEY GENERAL'S MANUAL, supra, at 15. The parallel enactment of the Uniform Trade Secrets Act in 1987 requires us, therefore, to consider whether that law has introduced a new species of unconditional exemption of "trade secrets" (via ORS 192.502(8)), or rather leaves such secrets subject to the same "public interest" balancing test which applied up to 1987 (under ORS 192.501(2) and its predecessor section, then and now).

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[6] It might be questioned whether this document should be subject to analysis only under the "real estate appraisal" exemption (considered in part 4 below), since it obviously is a real estate appraisal and that is the more specifically relevant exemption. That point might have merit if this were merely an appraisal of, say, a residential house. Here, however, this appraisal document is also an evaluation of a major commercial plan of future development of a highly competitive business projected to operate for many years and potentially involving large sums of public money--making the "trade secrets" exemption also relevant, at least on these facts.

For the reasons explained following, we conclude that the conditional nature of the trade secrets exemption, dependent upon evaluation of the public interest in disclosure, continues to be the proper test, notwithstanding the enactment of the Uniform Trade Secrets Act. The legislature's main purpose in enacting the UTSA was to more exactly define the nature of a trade secret (which had been the subject of various interpretations by case law) and to establish clearly the circumstances under which a trade secret had been "misappropriated," the improper conduct for which the UTSA creates the particular remedies specified by this Act. As relevant to the particular facts presented upon this present public records petition, the UTSA defines "misappropriation" as follows:

> "'Misappropriation' means: *** (d) Disclosure or use of a trade secret of another without express or implied consent by a person, who at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was:***
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> "(B) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
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> "(C) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use." ORS 646.461(2).

As used in this definition of "misappropriation," the term "person" "...means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency or any other legal or commercial entity." (Emphasis added). ORS 646.461(3). By the plain definition of the term "person," the Port is a governmental agency generally subject to the UTSA prohibition of "misappropriation" of a trade secret. Quite arguably, also, the Port, by having accepted this appraisal document subject to its Limiting Condition No. 3 (quoted in part 2, page 5 above), which pledges the Port to strict confidentiality, would be committing a "misappropriation" as defined in the UTSA if it were to freely disclose this document to petitioner (and, by necessary corollary, to the general public), unless this legislative scheme of parallel statutes dealing with the same subject of "trade secrets" still preserves the basic scheme of the pre-existing public records law -- that a trade secret nevertheless must be disclosed if the public interest weighs in favor of disclosure in the "particular instance." ORS 192.501.

Seeking guidance upon this issue, this office ordered and reviewed the legislative history of Senate Bill 298 (1987), which enacted the Uniform Trade Secrets Act, ORS 646.461 et seq. Minutes, Senate Judiciary Committee (1987), April 1, 7 and 14; Minutes, House Judiciary Subcommittee 3 (1987), May 28 and June 3; Minutes, House (full) Judiciary Committee (1987), June 5. The minutes disclose that the lead witness who provided the comprehensive explanation of SB 298 when it was first considered in the Senate Judiciary Committee, April 1, 1987, was Alex Johnson, described as a patent, trademark and copyright lawyer from Portland with considerable experience in trade secrets legal issues.[7] He described SB 298 as substantially the same as a bill first proposed in 1979 developed by the National Conference on Uniform Laws. Apparently, 20 or more states had adopted substantially similar laws. At the very end of what appears to have been a substantial colloquy between Mr. Johnson and the Committee, the following exchange is recorded:

> "SENATOR [JOYCE] COHEN asked whether this would make any difference in the kinds of information available under the public records law.
>
> "MR. JOHNSON said he knows of no one who contemplates that. He added that for anyone who was interested the legislative history on this bill is located in Exhibit G." Minutes, Senate Judiciary Committee, April 1, 1987 at page 11.

This exchange -- the only one found on this subject in the minutes -- significantly supports the interpretation that the UTSA was not intended to override the conditional character of the trade secrets exemption under the public records law. Furthermore, specific amendments to SB 298 proposed by the Department of Justice reinforce the perception that the conditional character of the trade secrets exemption was intended to continue after enactment of the UTSA. On April 14, 1987, at a work session on SB 298, certain amendments proposed by the Attorney General, described by the committee's legal counsel, were adopted:

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[7] Although the Committee minutes do not expressly so state, the Legislation Director of the Oregon State Bar confirms that attorney Alexander C. Johnson, Jr., did appear as the representative of the Patent and Trademark Section of the Bar, in support of enactment of the UTSA. He was the lead witness and principal expositor of the provisions of SB 298.

> "[COMMITTEE] COUNSEL [ERIC] CARLSON...referred to proposed amendments submitted by the Department of Justice dealing with potential liability of state and local governments for disclosure of trade secrets (Exhibit G). He said the Department of Justice had no objection to the bill, but they wanted to make sure that local and state governments were protected from liability under the Public Records Law if they were required to disclose trade secrets." Minutes, Senate Judiciary Committee, April 14, 1987, at 7.

Immediately thereafter, these amendments were adopted, now codified as ORS 646.473(3), which provides:

> "(3) Notwithstanding any other provision in ORS 646.461 to 646.475 [the UTSA], public bodies and their officers, employees and agents are immune from any claim or action for misappropriation of a trade secret that is based on the disclosure or release of information in obedience to or in good faith reliance on any order of disclosure issued pursuant to ORS 192.410 to 192.490 [the public records law] or on the advice of an attorney authorized to advise the public body, its officers, employees or agents."

Although the focus of this provision is upon protecting governmental agencies from liability for money damages (rather than expressly addressing the continuing applicability of the "public interest" conditional factor in public records law trade secrets cases), we infer that it implies that the trade secrets exemption remains subordinate to a potentially overriding public interest in disclosure, on a case-by-case basis, as was provided by law prior to the passage of the UTSA. Thus, we conclude that the trade secrets exemption continues to be conditional, dependent upon the public interest in disclosure. The third question then arises.

3.3 Does the public interest factor favor disclosure of this appraisal document? Although we have concluded (part 3.2 above) that the conditional character of the trade secrets exemption, subject to the "public interest" balancing factor, continues even after the enactment of the UTSA, we also agree with the observation of the Attorney General's Manual that enactment of the UTSA probably evidences a legislative desire for what the Attorney General terms "...heightened scrutiny of

contentions that the public interest requires the disclosure of records asserted to be trade secrets." ATTORNEY GENERAL'S MANUAL, supra, at 20. In other words, a conservative approach protective of trade secrets generally is appropriate, subject only to a convincing demonstration that the public interest outweighs the reasons for protection from disclosure in a "particular instance." ORS 192.501.

Of course, private contracts -- including contracts between citizens and government agencies -- are subject to duly-enacted positive law, such as the public records law. The appraisal document's restrictive Limiting Condition 3 (p. 5, above), pledging the Port to confidentiality, necessarily was entered into subject to the conditional nature of the public records law exemption for trade secrets. Consequently, the contract provision (if it is viewed as a "contract"), cannot change the conditional nature of the exemption provided by public law. Bronson v. Moonen, 270 Or 469, 478-81, 528 P2d 82 (1974) (contract clause contrary to positive law generally is unenforceable).

Certainly, the Kennedy and Kennedy law firm presents on behalf of C&W persuasive reasons why the public interest generally would not require disclosure of legitimate trade secrets which come into the possession of government agencies, including the appraisal document now under review.

> "The public interest would suffer by the disclosure of the appraisal. The confidentiality of appraisal reports is a significant concern for appraisers. Because an appraisal involves the application of various evaluation methodologies to a specific piece of real property under a unique set of assumptions, it is extremely important to appraisers that information not be taken out of context or disclosed to persons unfamiliar with the property or the process of formulating an appraisal. Further, each appraisal contains a compilation of materials that could be used by competitors for their own advantage. Requiring that appraisals prepared for a public body be treated as a disclosable public record without the advance consent of the appraiser would have a chilling effect. Appraisers would be reluctant to prepare appraisals for public entities. This would be detrimental to public bodies and, thus, the public. In this specific situation, had it known

> that the appraisal was subject to disclosure, Cushman and Wakefield may not have agreed to provide appraisal services to the Port." Letter from Attorney Rhonda W. Kennedy on behalf of C&W, dated December 13, 1993, at page 2.

Nevertheless, after giving the matter full consideration this office concludes that the public interest does weigh in favor of disclosure of the great bulk of the material contained in the appraisal document. The circumstances in this case are rather unusual and perhaps somewhat unique. The appraisal itself is a major document that apparently may have played a critical part in the Port's governmental decision-making process. It served as well the purpose of marshalling information that was used, in at least attenuated form, to convince the state treasury and PERS to undertake a very substantial potential liability of public funds in the amount of $50 million. It is uncontested that there have been major problems executing this project, which naturally raises the question whether the decision to proceed with the Pamcorp proposal was a prudent one in the public interest. Under these unusual circumstances, we believe that petitioner has made out sufficient facts to conclude that the public interest weighs in favor of disclosure of most of this appraisal document, excepting two of the Addenda (discussed following).[8]

Contrariwise, disclosure of two of the appraisal Addenda should be denied: both contain sensitive proprietary information potentially useful to C&W's competitors -- but neither of them is central to understanding the appraisal document. The Addendum captioned "Cushman & Wakefield

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[8] Although C&W is not a formal party to this public records petition proceeding, and there are no specific provisions of the public records law which confer "third party" status upon an entity which objects to disclosure of information, the UTSA authorizes any aggrieved party to sue for an injunction to prevent an improper disclosure of a trade secret, ORS 646.463. Presumably, C&W would have at least this option for indirectly "appealing" our decision favoring disclosure of the appraisal in this case. The UTSA also allows recovery of damages for actual loss or for unjust enrichment occasioned by misappropriation of a trade secret, and even allows punitive damages in appropriate cases -- plus an award of reasonable attorney fees for "willful or malicious misappropriation." ORS 646.~~645~~ [465], 646.467. Even if the damages remedies may be precluded by ORS 646.473(3), as discussed in the text, the injunctive remedy apparently may be available.

Appraisal Division National Investor Survey -- September 1990" (7 pages) contains a detailed canvass of dozens of apparent potential investors and related information. The addendum "Client List" (3 pages) names numerous C&W customers or former customers which could provide a "target list" for potential competitors. The public interest does not require the disclosure of either of these Addenda.

4. The real estate appraisal information exemption, ORS 192.501(6).

ORS 192.501(6), also invoked by the Port, exempts from disclosure "Information relating to the appraisal of real estate prior to its acquisition...unless the public interest requires disclosure in the particular instance." Petitioner suggests that this exemption applies only to information relating to an appraisal, rather than the appraisal itself -- a distinction we reject as inconsistent with the purpose of the exemption. The Attorney General's Manual states that "This exemption is intended to permit public bodies to obtain information, in confidence, concerning the value of real estate that the public body may purchase. A parallel provision exists under the Public Meetings Law, which exempts from open meetings requirements '...deliberations with persons designated by the governing body to negotiate real property transactions.' ORS 192.660(1)(e)." ATTORNEY GENERAL'S MANUAL, supra, at 24. In the ordinary course of transactions of this kind the appraisal document often would constitute virtually the only information relating to the appraisal of real estate which would be submitted to the public body.

On the other hand, the respondent Port contends that the phrase "...prior to its acquisition," which apparently qualifies this exemption, is not to be taken as a definite time limitation, after the occurrence of which the exemption expires. We are not so sure that contention is correct. But even if the qualifying phrase is intended to be a time limitation upon the life of this exemption, we conclude that the putative time limitation has not expired as applied to this present petition.

First, we believe that a broad interpretation of the term "acquisition" is warranted. In the present case, it is obvious that the Port in one sense already has "acquired" the aircraft maintenance facility which it contracted with Pamcorp to build. But according to the published account in The Oregonian of February 2, 1994 (footnote 2 above), the state presently is buying out Pamcorp's existing interest in the

aircraft maintenance facility and intends to market it, if possible. Logically, a public body may acquire information relating to the appraisal of real estate either as potential buyer of real estate, or as a potential seller of it. Although obtaining an independent real estate appraisal may more often occur when purchase of property is contemplated, an appraisal might also aid the decision-making process of a public agency in considering the sale of property it already owns.

Given the purpose of this exemption to protect the bargaining position of the public agency in prospective real estate transactions and to promote informed governmental decisions respecting public property, we think it appropriate to regard the potential sale of public property, to which the real estate appraisal is relevant, as also a prospective "acquisition" -- by a potential buyer of the property. The financial interest of the public agency (and the taxpayers) will be equally involved whether the negotiations relate to buying or selling real estate. Because we conclude under this interpretation that there still is a prospective "acquisition" to which this real estate appraisal is relevant, we need not decide on this public records petition whether the real estate appraisal exemption simply lapses entirely when no reasonably prospective "acquisition" can be shown by the public agency.

This leaves only consideration of the final factor: whether the public interest requires disclosure of this real estate appraisal in the present "particular instance." ORS 192.501. There is no need to repeat here the analysis of the "public interest" factor already discussed in connection with our consideration of the "trade secrets" exemption (part 3.3 above). For the same reasons stated there, we conclude that the real estate appraisal exemption, although applicable in principle to this case, must yield to the public interest in disclosure of the appraisal document (excepting the two Addenda disclosure of which is denied for the reasons stated in part 3.3, pp. 14-15 above).

5. Conclusion and order.

This public records decision has presented a difficult issue of balance between the legitimate protection generally afforded by the public records law for sensitive trade secret information, versus the overriding public interest in disclosure of such information in unusual instances. Despite C&W's reasonable expectation that its limiting condition of confidentiality would be honored by the Port, all parties

involved likewise must be held to have acted subject to the overriding public policy declared by the public records law, as we have construed it. That law, in both its "trade secrets" and its "real estate appraisal" exemptions, subordinates the general rule of confidentiality to the public's superior right to acquire information about how the government is transacting the public business, where sufficiently significant facts support that the public interest in disclosure is entitled to the greater weight.

Given the large amount of public funds potentially at stake and the intrinsic importance of this project in its own right, and particularly in light of the obvious major check which this project apparently is suffering, we conclude that the public interest requires disclosure in this particular instance.

Accordingly, it is now ordered that:

(1) The petition of Steve Mayes for The Oregonian is granted in part: The entirety of the "APPRAISAL OF REAL PROPERTY/PAMCO Aircraft Maintenance Facility/Air Trans Center/Portland International Airport/As of June 1, 1992" promptly shall be disclosed to petitioner, excepting those portions concerning which disclosure is denied in paragraph (2) following (and subject to the payment of the Port's fee, if any, not exceeding the actual cost of providing this record, consistent with ORS 192.440).

(2) The petition is denied in part: Disclosure of two of the Addenda is denied, namely, C&W's National Investor Survey (7 pages) and C&W's Client List (3 pages) (for the reasons discussed in part 3.3, pp. 14-15 above).

Very truly yours,

/s/

MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

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94-02

NOTICE TO PUBLIC AGENCY: Pursuant to ORS 192.450(2), 192.460, 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 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within 7 additional days thereafter.

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