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February 10, 2020

Brad Schmidt
The Oregonian/OregonLive
1500 S.W. First Avenue, Suite 400
Portland, Oregon 97201

Deanna Laidler
OHSU Legal Department
3181 S.W. Sam Jackson Park Road
Portland, Oregon 97239

Re: Petition of Brad Schmidt seeking documents relating to the Unity Center

Dear Mr. Schmidt and Ms. Laidler:

In his public records petition, dated February 3, 2020, Mr. Schmidt asks this office to order Oregon Health & Science University (OHSU) to disclose:

- The pro forma for what became the Unity Center for Behavior Health
- Joint Operating Agreement for the Unity Center

The Unity Center for Behavioral Health (Unity) is a cooperative venture between Legacy Health, Portland Adventist Medical Center, Kaiser, and Oregon Health and Science University (OHSU). Unity exists to provide emergency psychiatric care in the Portland metropolitan area. The Unity center has operated for the last few years and has filled a gap in our local infrastructure for treatment of those suffering from acute mental illness. The Unity center has also received significant negative attention in the last year relating to investigations, administrative and criminal, allegations of patient mistreatment and an unsafe staff working environment. The Unity center is of critical local importance and, beyond that, has been the focus of much media attention in recent months.

However, petitioner's current interest in its foundational documents relates to a request for the state to backfill some of an unanticipated \$21 million budgetary shortfall. In publicly available communications Unity has stated that it initially expected to lose \$6 million a year but, due to unforeseen, and publicly unidentified, factors it is actually losing upwards of \$21 million.

The two documents at issue here set out the terms of the agreement between the four hospital systems in relation to staffing, funding, and operations as well as a high-level projected operating budget for the first five years.

DISCUSSION

A. OHSU Sensitive Records – ORS 192.355(21)

ORS 192.355(21) exempts from disclosure,

Sensitive business records or financial or commercial information of the Oregon Health and Science University that is not customarily provided to business competitors.

In its only opinion interpreting this section, the Court of Appeals concluded that “business record” means “records or information pertaining to activities of OHSU that are commercial in nature—including medical and scientific research activities if conducted for commercial purposes or in a commercial manner—where the records or information ordinarily would not be provided to either OHSU’s or its business partners’ competitors.” *In Defense of Animals v. OHSU*, 199 Or App 160, 173 (2005).

There are two separate records at issue here, the Joint Operating Agreement (JOA) and the Unity pro forma. *In Defense of Animals* did not address financial information, which is precisely what the pro forma is, so its discussion is of little use.

We agree with OHSU that it is unique in that the legislature, by way of this section and the greater legislative context around the formation of OHSU, intended that OHSU be able to pursue many activities in secret that no other public body could. However, while the legislature could have exempted all of OHSU’s business, commercial, and financial records, it did not choose to do so. Rather, ORS 192.355(21) exempts only “sensitive” records. For this to have meaning, we must conclude that a meaningful subset of OHSU’s business, commercial, and financial records are not “sensitive.”

Petitioner argues that the pro forma is not a sensitive record for a number of reasons. First, some information cited as originating from the pro forma was released by Unity in a public presentation in 2015. Second, almost all of OHSU’s competitors in the local healthcare market are partners in Unity and already have access to the information in the pro forma.¹ Third, a publicly available communication to the Oregon Health Authority breaks down Unity’s annual operating losses since FY 2017 as well as projected losses for FY 2020. Synthesizing these points petitioner argues that five year old financial assumptions, already shared with OHSU’s local competitors, and that have proven significantly inaccurate are not sensitive.

As to the pro forma, we agree with petitioner. OHSU has the burden of establishing the applicability of any exemption to the public records law. On this record OHSU has not proven to us that the release of apparently inaccurate and dated financial projections that have already been shared in detail with its local competitors and, in bottom-line terms, with the public are “sensitive.”

Petitioner does not present as compelling an argument as to the JOA. OHSU has provided to us the confidentiality agreement that was executed as part of the negotiating process. Having

¹ Providence is the only major local medical provider not a participant in the Unity center.

reviewed the agreement and the JOA, we do find that the details of an agreement between business partners on the minutia of operating a cooperative venture is a “business record.” The parties clearly intended it to be treated as confidential and none of the countervailing factors that exist for the pro forma are present for the JOA. Given the standard articulated by the *In Defense of Animals* court we find the JOA is a sensitive business record of OHSU and thereby unconditionally exempt from disclosure. Because we find the pro forma is not “sensitive” under this section, we proceed to analyze the other exemptions asserted by OHSU.

B. Confidential Submissions – ORS 192.355(4)

ORS 192.355(4) exempts from disclosure,

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.

To this end, OHSU cites the detailed confidentiality agreement entered into at the outset of the planning process. We do not believe this exemption applicable here for two reasons. First, it is not clear that the pro forma was “submitted to” OHSU, rather it was developed by OHSU, in collaboration with its partners. Second, even if in a technical sense this was “submitted,” for the same reasons we found the pro forma not “sensitive” above, we cannot find that the public interest would suffer by the disclosure.

We do not mean to suggest that all financial projections developed in confidence must be disclosed moving forward. Rather, given the high public interest in Unity, the significant financial ask of the state government, the already significant contributions made by local government, and the high-level nature of the financial information involved, we have not been presented with a strong, and fact-specific, case for a chilling effect on OHSU’s commercial activities moving forward if this information is released.

C. Trade Secrets – ORS 192.345(2) and ORS 646.461

ORS 192.345(2) conditionally exempts trade secrets from disclosure under the public records law. However, the Court of Appeals has made clear that the misappropriation of trade secrets provisions in ORS 646.461 *et seq.* apply unconditionally in the public records context. *Pfizer Inc. v. Oregon Dep’t of Justice*, 254 Or App 144, 158 (2012). That is to say, if release of a public record would constitute a misappropriation of a trade secret, those records are exempt from disclosure without consideration of the public’s interest in disclosure.

ORS 646.461(4) defines a trade secret as:

information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique or process that:

(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

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.


We do not agree with petitioner that OHSU has waived this exemption by the fact that its local competitors are already aware of the information – a joint venture can certainly create its own trade secrets known only to the participants in the venture and not to those outside it. However, petitioner's arguments about the sensitivity of the pro forma apply equally here. Assuming that the pro forma is "cost data" under this section, OHSU has not established that a hypothetical competitor seeking entrance into the Portland metro market for emergency psychiatric care could "obtain economic value" from the disclosure of these old, high-level, and admittedly inaccurate, financial projections.

We reach the same conclusion under ORS 192.345(2). OHSU has not established that the pro forma, under these circumstances, has "actual or potential commercial value" and it does have some policy value in evaluating the pending public funding request made by Unity.

ORDER

Accordingly, the petition is granted as to the pro forma and denied as to remainder of the Joint Operating Agreement. OHSU shall promptly provide a copy of the Unity pro forma, as found in Exhibit D of the Joint Operating Agreement, to petitioner. This release is subject to the payment of fees, if any, not to exceed OHSU's actual costs in producing the records.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

Notice to Public Agency

Pursuant to ORS 192.411(2), 192.415, and 192.431(3) your agency may become liable to pay petitioner's attorney's 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 seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.

20-04