



**MIKE SCHMIDT**, District Attorney for Multnomah County

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January 21, 2022

Tom Busse  
TomBusse@protonmail.com [via email only]

Robert Sinnott  
Assistant County Attorney  
501 S.E. Hawthorne Boulevard, Suite 500  
Portland, Oregon 97214

Re: Petition of Tom Busse seeking records from Multnomah County regarding a public health grant

Dear Mr. Busse and Mr. Sinnott:

Petitioner, Tom Busse, has asked this office to order Multnomah County to release to him records relating to a public health grant that it received from Gilead Sciences, Inc. Specifically he had requested:

1. FOCUS grant agreement with the Multnomah County Dept. of Public Health
2. Interim Grant Reports submitted under the FOCUS program, inclusive of grant accounting

The County denied petitioner's request, on the grounds that it was contractually obligated to assert that these records were exempt from disclosure in response to a public records request. Petitioner then appealed, arguing that the County may not contract its way around the public records law.

In its response to this appeal the County and Gilead cite ORS 192.345(2), the trade secret exemption, ORS 192.355(2), which exempts information of a personal nature, and ORS 192.355(4), which exempts confidential submissions. For the reasons discussed below, we grant the petition in part.

### **BACKGROUND**

Gilead Sciences, Inc. is a biopharmaceutical company. In its submission to this office it describes the FOCUS program as follows:

The FOCUS Program is a public health program developed and founded by Gilead in 2010. It aims to decrease the stigma underlying viral testing and diagnosis and bring human immunodeficiency virus ("HIV"), Hepatitis C ("HCV"), and Hepatitis B ("HBV") screening and linkage to care into alignment with Centers for Disease Control and Prevention ("CDC"), U.S. Preventive Services Task Force ("USPSTF"), and state and local health department

guidelines. The FOCUS Program provides awards to healthcare organizations throughout the United States to enable such organizations (termed “FOCUS partners”) to develop sustainable systems-level infrastructure changes using the FOCUS T.E.S.T. Model with regard to HIV, HCV, and/or HBV screening and linkage to care. As part of the program, FOCUS partners submit specific reports, which explain how they have implemented their FOCUS project to-date, gaps and issues identified, and certain other project-related information that is specific to the FOCUS Program.

The Multnomah County Health Department received a FOCUS grant to implement expanded viral testing options in county health clinics. It is the initial grant agreement describing the County’s reporting obligations, and an interim report prepared under this grant, that are at issue in this appeal.<sup>1</sup>

## DISCUSSION

### A. Trade Secrets – ORS 192.345(2) & 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.

The two documents at issue present different considerations, so we address them each in turn.

#### *i. The grant agreement*

As an initial matter, Gilead no longer claims that the entire grant agreement contains trade secret information. Gilead asserts that all of Section 2, the last paragraph of Section 1, and

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<sup>1</sup> The petition filed with this office also references a “Final Grant Report.” However, the underlying public records request did not include this record, so we do not have jurisdiction to consider it here.

both attached exhibits constitute trade secrets. As to the balance of the agreement Gilead, and by extension the County, no longer asserts it is exempt from disclosure.

In *Pfizer* the court wrote that an entity asserting information is a trade secret must establish that it “(1) gain[s] value because it is not generally known and (2) [is] the subject of reasonable efforts to maintain that secrecy.” *Id.* at 163. An uncontradicted declaration of a senior company executive that “adequately described the potential harm that would result from the release of the [document]” is sufficient to establish these elements. In this case, Gilead has submitted such a declaration and, on an uncontradicted record, this is sufficient to establish that the information contained in Section 2, the last paragraph of Section 1, and Exhibits A & B constitutes a trade secret.<sup>2</sup> The balance of the grant agreement must be disclosed, except as specifically mentioned Section C below.

*ii. Interim grant report*

As to the interim report prepared by the County Health Department, it is not a trade secret because it is factual information generated externally to Gilead and held by a third party. Certainly the report *relates* to Gilead’s program, but we know of no authority, in any jurisdiction, finding that a factual report prepared by a government body can constitute a trade secret of a private firm.

Perhaps, in Gilead’s possession, the aggregate of all factual reports that it gathers from all FOCUS grant recipient might be a compilation of information that would meet criteria under ORS 646.461(4). But an Oregon government employee’s recitation of operational successes and shortcomings in implementing a grant-funded program is a quintessential public record about the conduct of public business. We do not believe that the legislature could have intended to allow a private firm to shroud local government operations in secrecy. And, given the premise that the public records law must always be interpreted in favor of disclosure, we cannot find this government-prepared report constitutes a trade secret. *Colby v. Gunson*, 224 Or App 666, 676 (2008) (finding this premise extends to exemptions existing outside the public records law).

**B. Confidential Submission**

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.

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<sup>2</sup> We recognize that in an *ex parte* sub-judicial proceeding before the district attorney under ORS 192.415, petitioner does not have access to the civil discovery tools necessary to attempt to contradict these assertions. See, *Pfizer* at 163 (“If [DOJ] wanted to challenge Mr. Gibney’s factual assertions, it could easily have sought discovery from Pfizer, including the deposition of Mr. Gibney. It also could have attempted to submit a factual affidavit by a competent witness challenging Mr. Gibney’s sworn statements regarding Pfizer’s investment in the creation and the maintenance of the protected material.”) (quoting plaintiff’s brief on means of contradicting such a declaration)

Because we have already concluded that the information Gilead seeks to exempt from disclosure in the grant agreement is exempt as a trade secret, we need not further consider whether or not it also constitutes a confidential submission.

As to the interim report, it cannot qualify for protection under this section because it was not “submitted to a public body.” This information was prepared by a public body and submitted to Gilead, not the other way around. As such, it is not a confidential submission under ORS 192.355(4).

Gilead makes the related argument that, whatever the technical applicability of this exemption, the County contractually obliged itself to keep these materials confidential in the grant agreement. As the Court of Appeals held in *Pfizer*, a confidentiality agreement may bind a public body to keep materials confidential, but only to the extent that the Oregon Public Records Law independently exempts them from disclosure. *Pfizer* at 146.

A confidentiality agreement, whatever its wording, does not have any independent ability to render government records confidential.<sup>3</sup> Rather, it may only mandate that a public body assert an exemption that would otherwise apply. This does not render confidentiality agreements meaningless, however. With a few exceptions not relevant here, all exemptions to the public records law are permissive. Public bodies may choose to release a record even if they could lawfully assert an exemption. *Colby v. Gunson*, 224 Or App 666 (2008) (“An exemption from disclosure under the Public Records Law allows, but does not require, nondisclosure of the record.”) A confidentiality agreement may obligate a public body to assert an exemption that they would otherwise prefer not to. It could also serve to establish that the public body obliged itself to keep the material confidential, which is one of the five elements that a public body must establish to withhold records under this section.

C. Information of a Personal Nature – ORS 192.355(2)

ORS 192.355(2) exempts from disclosure:

Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

Gilead and the County make various claims of exemption under this section for names of specific employees, their health information, job titles of relevant employees, and an email address.

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<sup>3</sup> We recognize that the confidentiality agreement in *Pfizer* expressly referenced the public records law in a way that the agreement here does not. This does not alter the foundational premise that a public body may not, by contract, make confidential what the legislature has mandated be public.

Analyzing a claim of exemption under this section involves three questions: 1) is the information of a personal nature; 2) would disclosure constitute an unreasonable invasion of privacy; and 3) if yes to both, does the public interest nonetheless require disclosure. *Jordan v. MVD*, 308 Or 433 (1989). Gilead and the County assert that this particular requestor has a history of harassing and threatening health officials and that disclosure of any personal information, to include names, of individuals that might appear in the grant agreement or interim report would unreasonably invade these employees' privacy.

The likely actions of a requestor upon receiving information can inform whether its release constitutes an unreasonable invasion of privacy. See, *Jordan* at 444 (Gillette concurring).

A person's name is "personal information" and can be withheld under this section upon an appropriate factual showing. *Petition of Babcock*, MCDA PRO 04-01 (2001) (exempting names of animal control officers who had euthanized animals given specific past actions of the particular requestor). Given the assertions of Gilead and the County, and review of relevant police records, we agree that release of these names to this requestor would unreasonably invade the privacy of the named employees. As such, the personal names of Gilead employees and County employees appearing in these records may be redacted.

The copies of the records provided for our review also suggest redaction to job titles. General job titles (e.g. "regional manager" "vice president" "team lead" etc.) are not personal information. These positions could be occupied by any person or persons at any time and are not "personal" to any individual. Accordingly, we do not find them exempt under this section.

The interim report contains a single sentence discussing personal health information of a County employee in section 1.c.iii. Release of a person's medical information is a presumptive invasion of their privacy and, as such, this too may be redacted. See, *Petition of Friedman*, MCDA PRO 18-39 (2019).

Lastly, Gilead asserts that an email address appearing in the grant agreement is exempt from disclosure. While not exempt under this section (it is not an employee's individual email so is not "personal information") it nonetheless may be withheld from disclosure pursuant to ORS 192.355(40)(a), which exempts "[e]lectronic mail addresses in the possession or custody of [...] a local government[.]"

## ORDER

Accordingly, the petition is granted in part. The County is ordered to release the interim grant report and a copy of the grant agreement redacted consistent with the discussion above. In summary:

<i>Document</i>	<i>Approved Redactions</i>
<i>Interim Grant Report</i>	p. 1 email address
	p. 12 first sentence of section 1.c.iii
	passim individual employee names
<i>Grant Agreement</i>	pp. 2–3 the last paragraph of Section 1 and the entirety of Section 2
	p. 8 names of signatories

pp. 9-10	Exhibit A in its entirety
p. 11	Exhibit B in its entirety

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This release is subject to the payment of fees, if any, not to exceed those authorized by ORS 192.324(4).

Very truly yours,



MIKE SCHMIDT  
District Attorney  
Multnomah County, Oregon

Cc: Kathryn Mantoan, counsel for Gilead

**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.

**21-62**