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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COLUMBIA

COLUMBIA RIVERKEEPER, a non-profit
corporation,

Plaintiff,

v.

PORT OF ST. HELENS, a special district port
of the State of Oregon,

Defendant.

Case No. 11-2348

PLAINTIFF'S COMBINED REPLY
IN SUPPORT OF PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND MEMORANDUM IN
RESPONSE TO DEFENDANT'S
CROSS MOTION FOR SUMMARY
JUDGMENT

COMBINED RESPONSE / REPLY MEMORANDUM

I. SUMMARY

"The guiding principle in Oregon is to protect the public's right to inspect public records." *Kluge v. Oregon State Bar*, 172 Or App 452, 455, 19 P3d 938 (2001) (citing ORS 192.420). The Port of St. Helens ("Port") violated the letter and spirit of Oregon's open government law, the Inspection of Public Records Act ("Public Records Act"), ORS 192.410 *et seq.*, when it joined a private company in a confidentiality agreement that shields from public review public records generated by the Port or submitted to the Port by a third party. Nearly a year after first receiving Riverkeeper's public records request, the Port now concedes that it

1 unlawfully withheld public records—those records generated by the Port—from Riverkeeper.
2 See Def. Memo. in Supp. of Cross Mtn. (hereafter “Def. Br.”) at 5 – 6 (“Upon careful
3 consideration of the Riverkeeper position, the Port is now willing to produce copies of
4 documents generated by the Port . . .”). Based on this concession, Riverkeeper is entitled to
5 summary judgment as to all records generated by the Port. The fact that it took the Port a year
6 and a half (and a lawsuit) to consider Riverkeeper’s position and to admit error has harmed
7 Riverkeeper and the public interest in open government.

8 As to the remaining still-withheld public records—records submitted to the Port by the
9 unnamed company or by other private entities—the Port fails to carry its burden to demonstrate
10 that each withheld record satisfies every element of the confidentiality exemption, ORS
11 192.502(4). Contrary to case law interpreting the Public Records Act, the Port advances a
12 sweeping interpretation of the confidentiality exemption which, if accepted, would make new
13 law and grant public bodies broad latitude to withhold public records.¹ Under the Port’s theory,
14 a public body can at any time, without any public disclosure, discussion, or vote, keep all
15 communications secret simply by entering into a confidentiality agreement with a private
16 business. All the public body has to do is claim that releasing the records would somehow harm
17 the public interest in “job creation and tax revenue” and otherwise public records can be

¹ See e.g., *Jordan v. MVD*, 308 Or 433, 438, 781 P2d 1203 (1989) (“Our decisions reflect the preference for a policy of governmental openness in Oregon.”) (citation omitted); *Kluge v. Oregon State Bar*, 172 Or App 452, 455 (“Disclosure is the rule and exemptions from disclosure are to be narrowly construed.”); *City of Portland v. Oregonian Publishing Co.*, 200 Or App 120, 124, 112 P3d 457 (2005) (stating that Oregon’s “strong and enduring” policy that public records and governmental activities be open to the public is “embodied in a statutory presumption that documents will be disclosed to the public.”) (citing ORS 192.420). The statute’s presumption in favor of disclosure advances the legislative intent of allowing citizens, journalists, businesses, and others to monitor the activities of publicly elected officials and public servants. See e.g., *In Defense of Animals v. Oregon Health Sciences Univ.*, 199 Or App 160, 175 – 176, 112 P3d 336 (2005) (“The public’s interest in disclosure encompasses the public’s interest in information about the manner in which public business is conducted . . . and the right of the public to monitor what appointed officials are doing on the job.”) (internal citations and quotations omitted).

1 withheld. Such an exception would swallow the rule. The Port does not advance any argument
2 or direct the Court to any case law that allows such conduct.

3 The record before this Court demonstrates that the Port's competitors—other public ports
4 on the Columbia River—routinely produce public records about prospective port tenants.
5 Against this backdrop, the Port's argument that, as a matter of law, the public interest will be
6 harmed by such disclosure is simply not factually or legally credible and is clearly not supported
7 by the record. For these reasons, the Court should reject the Port's suggestion that this Court
8 make new law by approving confidentiality agreements that undermine the "open government"
9 premise of the Public Records Act.

10 II. ARGUMENT.

11 The Port fails to carry its burden—described by the Oregon Court of Appeals as a
12 "daunting" burden—to demonstrate that it can withhold public records under the confidentiality
13 exemption. *See City of Portland, supra*, 200 Or App at 124. To prevail, the Port would have to
14 satisfy its burden on each element of the five-part confidentiality exemption test for each
15 withheld public record.

16 A. As to Records Generated by the Port, Riverkeeper is Entitled to Summary 17 Judgment because the Port Has Effectively Admitted that it Improperly withheld 18 such Records.

19
20 Under the plain language of the confidentiality exemption, the exemption only applies to
21 records "submitted" to a public body, not to records "generated" by a public body. *See* ORS
22 192.502(4) (stating that public records are only exempt from disclosure if the "[i]nformation [is]
23 **submitted** to a public body in confidence and not otherwise required by law to be **submitted**.");
24 *see also* Pl.'s Memo. in Supp. of Partial Summ. J. (hereafter "Pl. Br.") at 13 – 15. Nonetheless,
25 the Port withheld **every** public record requested by Riverkeeper, including all documents

1 generated by the Port. The Port has now conceded that the confidentiality exemption does not
2 apply to public records generated by the Port, stating:

3 Upon careful consideration of the Riverkeeper position, the Port is now willing to
4 produce copies generated by the Port

5
6 Def. Br. at 5.

7
8 Unfortunately, the Port then tries to limit the otherwise required disclosure by stating that
9 it will disclose such records only:

10 as long as they do not contain (or have been redacted to exclude) any confidential
11 information provided to the Port, including any source-identifying information.

12
13 *Id.* The plain language of the statutory confidentiality exemption clearly does not support this
14 approach: the confidentiality exemption only exempts information “submitted” to the public
15 body. The Port is asking this Court to read into the language of the statute something that is
16 clearly not there. The Court is forbidden from doing that. *See* ORS 174.010 (court cannot insert
17 what has been omitted or omit what has been inserted).

18 The Port then claims that this approach is “consistent with the decision in *Gray v. Salem-*
19 *Keizer School Dist.*, 130 Or App 556, 912 P2d 938 (1996).” In fact, it is not. The *Gray* court
20 held that specific portions of the documents **submitted** to the school district could be redacted
21 under the confidentiality exemption. 130 Or App 556, 566 – 67. The public record at issue in
22 *Gray*—a job applicant reference—was submitted to the public body. Nothing in *Gray* supports
23 the idea that a public body can withhold or redact public records generated by the public body.
24 Moreover, for the reasons explained in Riverkeeper’s opening brief and herein, the Port fails to
25 meet every element of the five-part confidentiality exemption test and, therefore, is not permitted
26 to redact **any** portion of the public records requested by Riverkeeper.

1 Riverkeeper requests, therefore, that the Court order the Port to produce all records that
2 the Port generated (*i.e.* documents that were not submitted to the Port). Riverkeeper addresses
3 the issue of whether the Port can withhold **submitted** documents in Section B below.

4 **B. The Port Fails to Demonstrate that Each Document Submitted to the Port by the**
5 **Unnamed Company Satisfies the First, Second, Third, and Fifth Elements of the**
6 **Confidentiality Exemption Test.**

7
8 The Port failed to meet the burden of demonstrating that **each** withheld public record
9 satisfies **every** element of the five-part confidentiality exemption test. The confidentiality
10 exemption test states:

- 11 1. The exemption applies only to information which is submitted voluntarily
12 when the informant is under no legal obligation, by statute, rule, contract, or
13 otherwise, to provide the information.
- 14 2. The agency must be in a position to show that the information was of a
15 nature which reasonably should be kept confidential.
- 16 3. The agency must show that it has obliged itself in *good faith* not to disclose
17 the information.
- 18 4. Disclosure must cause harm to the public interest.
- 19 5. The person must have, in fact, submitted the information in confidence.

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25 *Gray*, 139 Or App at 563 (emphasis in original) (citing *Attorney General's Public Records and*
26 *Meetings Manual*, 41 (1993)).²

² The Port criticizes Riverkeeper's citation to the confidentiality exemption test. Def. Br. at 4 ("For some reason, Riverkeeper used a 1993 version of the [Attorney General's] Manual to list the five-part confidentiality exemption test"). Riverkeeper cited to case law, *Gray v. Salem-Keizer School Dist.*, which adopted the 1993 Attorney General Manual ("Manual") five-part test. *Id.* 139 Or App at 563. Since *Gray*, the legislature has not amended the confidentiality exemption and courts continue to use the five-part test adopted in *Gray*. The Port relies on an updated version of the Manual. The Manual, however, is not "law," it is merely a summary of the law. The controlling law is that stated by the court in *Gray*. Moreover, the only substantive difference between the 2011 Manual and the *Gray* test is a change in the order of the test elements.

1 First, resolution of the Port's arguments that the records meet elements 1, 2, 3, and 5
2 requires this Court to review the withheld records *in camera*. The Port provides virtually no
3 description of the withheld documents. The Court, therefore, cannot determine whether each of
4 the withheld public records meets elements 1, 2, 3 and 5 of the confidentiality exemption test
5 without the benefit of reviewing each withheld record.³

6 Moreover, even if the Port had described each document, a public body's description of
7 withheld records is not sufficient grounds to prevail on a motion for summary judgment. In
8 *Kluge v. Oregon State Bar*, the Oregon Court of Appeals held that the trial court erred in relying
9 solely on the public body's description of the contested public records in ruling on the summary
10 judgment motion. 172 Or App 452, 458. The *Kluge* court explicitly held that: "Given the
11 public's right to inspect records and the fact that exemptions to disclosure are to be narrowly
12 construed, we conclude that the trial court erred in relying solely upon the Bar's description of
13 the contested records in reaching its decision to grant the Bar's summary judgment motion." *Id.*

14 In *Kluge*, an attorney sought public records from the Bar related to the attorney's
15 pending disciplinary action. *Id.* at 454. In support of its motion for summary judgment, the Bar
16 provided detailed descriptions of the categories of withheld public records. *Id.* at 457.
17 However, the Bar did not submit the withheld public records to the court for *in camera* review.
18 See ORS 192.490(1) (providing that "the court, on its own motion, may view the documents in
19 controversy *in camera* before reaching a decision."). The *Kluge* court concluded that, based
20 merely on the descriptions provided, the court had no way of verifying whether the public body's

³ To rule for the Port on these elements the Court would have to find that each document meets the "voluntary" (element 1), "reasonableness of the expectation of confidentiality" (element 2), "good faith" (element 3), and "submissions in confidence" (element 5) elements of the test. Without seeing each document and knowing the context of each submission, such a finding is not possible.

1 assertion that the documents met the elements of the exemption were, or were not, accurate. 172
2 Or App at 458.

3 Here, the Port asks this Court to make the same error that the *Kluge* court already held
4 was reversible. Since the Court has not had the benefit of reviewing the withheld records *in*
5 *camera*, the Court cannot find that the Port has carried its burden on elements 1, 2, 3, and 5.

6 **C. The Port Fails to Carry its Burden to Demonstrate that the Public Interest will**
7 **Suffer if the Public Records Submitted by the Unnamed Company are Disclosed.**

8
9 The Port cannot withhold the requested public records unless the Port proves that the
10 public interest will be harmed by disclosure. ORS 192.502(4) (requiring public body to
11 demonstrate that “public interest **would** suffer by the disclosure.”) (emphasis added). That is the
12 essence of element 4 of the confidentiality test. In attempting to prove this element, the Port
13 alleges a theoretical harm that would result from releasing public records related to a public body
14 and a prospective business. If accepted, the Port’s theory would expand the confidentiality
15 exemption in a way never intended by the legislature. In turn, the Port’s proposed interpretation
16 of the confidentiality exemption is directly contrary to the Oregon Supreme Court’s directive to
17 narrowly interpret exemptions from disclosure. *See e.g., Jordan v. MVD*, 308 Or 433, 438 – 39,
18 781 P2d 1203 (1989) (exemptions from disclosure are to be narrowly construed).

19 Specifically, public agencies and other public bodies could enter confidentiality
20 agreements at any time with private entities, and conduct government business in secret, on the
21 premise that the records need to be kept “confidential” to create jobs and generate tax revenue.
22 This would allow for secret interactions between public bodies and private entities about an
23 unlimited range of topics for months or years. This would effectively gut the Public Records
24 Act. Journalists, non-profits, citizens, and others would have no way of monitoring public

1 officials as they conduct public business. This Court should reject the Port's effort to create such
2 an exemption by fiat. The statute does not allow it, and the case law does not allow it.

3 1. **The Port's theory of harm to the public interest ignores the**
4 **legislature's decision to adopt specific, narrow exemptions that foster**
5 **business development.**
6

7 The Port's dire warnings about "the end of business as we know it" if the records are
8 disclosed conveniently ignores a series of Public Records Act's exemptions that allow for public
9 bodies to withhold public records on the basis of business interests. These specific, narrow
10 exemptions show that the legislature already struck the appropriate balance between the public's
11 interest in disclosure and the interest in fostering business development. *See* ORS 192.501(2);
12 501(6), 501(27), 502(17). For example, the trade secrets exemption states:

13 The following public records are exempt from disclosure under ORS 192.410 to 192.505
14 unless the public interest requires disclosure in the particular instance (2) Trade
15 secrets. 'Trade secrets,' as used in this section, may include, but are not limited to, any
16 formula, plan, pattern, process, tool, mechanism, compound, procedure, production data,
17 or compilation of information which is not patented, which is known only to certain
18 individuals within an organization and which is used in a business it conducts, having
19 actual or potential commercial value, and which gives its user an opportunity to obtain a
20 business advantage over competitors who do not know or use it.

21
22 ORS 192.501(2). ORS 192.501(27) also conditionally exempts certain information related to
23 business interactions with a public body. *See* ORS 192.501(27) (conditionally exempting
24 "[i]nformation provided to, obtained by or used by a public body to authorize, originate, receive
25 or authenticate a transfer of funds, including but not limited to a credit card number, payment
26 card expiration date, password, financial institution account number and financial institution
27 routing number."). In addition, ORS 192.502(17) exempts specific records and communications
28 to certain Oregon agencies and public bodies, including ports, "by applicants for investment
29 funds, loans or services including, but not limited to, those described in ORS 285A.224." This

1 includes personal financial statements, financial statements of applicants, customer lists, and
2 marketing strategy information. *See also* ORS 192.501(6) (conditionally exempting
3 “[i]nformation relating to the appraisal of real estate prior to its acquisition.”). In the instant
4 case, the Port did not use any of the recognized business exemptions. Ignoring the valid business
5 exemptions, the Port urges this Court to adopt a sweeping new interpretation of the
6 confidentiality exemption. Under the Port’s theory, the specific exemptions to protect business
7 interests would not be necessary because public bodies could simply claim **everything** is
8 confidential.

9 In short, the legislature allows public bodies to withhold information that “gives the user
10 an opportunity to obtain a business advantage over competitors,” ORS 192.501(2), and
11 information regarding investment funds and financial statements. Public bodies, therefore, have
12 multiple legitimate exemptions to withhold information on the basis of fostering business
13 development. The Port, however, ignores this reality when arguing that the public interest in job
14 creation and tax revenue would suffer by disclosure because the floodgates would open and
15 businesses would no longer be willing to negotiate with a public port. In light of the Act’s
16 narrow exemptions to protect identified business information, the legislature already balanced
17 public disclosure and business needs.

18 **2. The Port’s contract with the unnamed company is not grounds for finding**
19 **harm to the public interest by disclosure.**

20 In *Guard Publishing v. Lane County School Dist.*, the Oregon Supreme Court recognized
21 that public bodies may not exempt public records from disclosure “simply by promising the
22 contributor confidentiality.” 310 Or 32, 39, 791 P2d 854 (1990) (“Nor may a public body
23 exempt public records from disclosure simply by promising the contributor confidentiality.”).
24

1 Yet that is exactly what the Port attempts to do in the instant case. The Port argues that the
2 public interest in “[t]he Port’s adherence to its commitments under the confidentiality
3 agreement” would be harmed by disclosure. See Def. Br. at 6. The Port fails to harmonize
4 this argument with the *Guard Publishing* decision and cites to no authority for the proposition
5 that it can enter a confidentiality agreement that exempts all public records from disclosure.⁴

6 Moreover, the Port’s argument that the records at issue are confidential is not supported
7 by the actual contract the Port signed. The Port argues that disclosing public records will harm
8 the public interest in the Port honoring its contractual commitments. In reality, the Port and the
9 unnamed company entered a contract that calls for compliance with state law and acknowledges
10 that a disclosure of public records does not constitute a breach of contract. In turn, the Port’s
11 argument that the “public interest” in the Port adhering to its contractual obligations is not
12 supported by the Port’s own confidentiality agreement.

13 Specifically, the confidentiality agreement between the Port and the unnamed company
14 only requires the Port to withhold confidential documents “to the extent permitted by law.” See
15 Def. Ans., Ex. 1 at 1. The Port’s confidentiality agreement states in part:

16 [Redacted] is willing to provide certain confidential information about its corporate
17 affairs and its proposed operations on the Property which it otherwise would not provide
18 without a confidentiality agreement being in place because of the risk of such materials
19 becoming public records in the hands of the Port, provided that the Port keeps the
20 information confidential **to the extent permitted by law** and as further described below,
21 including maintaining the confidentiality of such information, to the extent it qualifies as
22 confidential ‘trade secrets.’
23

⁴ If such agreements were lawful, a public body could enter into any number of confidentiality agreements, and use those to shield records of unlawful activities. Put in colloquial terms, “a promise is a promise” but not when the agreement is to doing something (like keeping otherwise public records secret) that is already against the law.

1 *Id.* (emphasis added); *see also id.* at 2, ¶ 3; *id.* at 2, ¶ 4.1. Paragraph 7 of the confidentiality
2 agreement further states:

3 This Agreement shall be construed in accordance with Oregon law, including but not
4 limited to ORS 192.410 to 192.505 [the Public Records Act]. Nothing in this Agreement
5 shall be construed as interfering with the Port's obligation to comply with the public
6 records disclosure requirements of ORS 192.410 to 192.505. . . .

7
8 *Id.* at 3, ¶ 7.⁵ In light of the specific terms of the Port's confidentiality agreement and the *Guard*
9 *Publishing* decision, which prohibits public bodies from exempting otherwise public records
10 based on promises of confidentiality, the Court should reject the Port's argument that the public
11 interest will suffer by disclosure of public records.

12 **3. The willingness of the Port's competitors, other public ports in**
13 **Oregon and Washington, to disclose public records undermines the**
14 **Port's argument that disclosure will harm the public interest.**

15
16 The Port's argument that the public interest in jobs and taxes will be harmed by
17 disclosure of the requested records is undermined by the actions of every other Columbia River
18 port that responded to Riverkeeper's virtually identical public records requests. The Port argues
19 that disclosing the public records regarding coal terminals "would destroy the ability of an
20 agency to do business, both now and in the future." Def. Br. at 1. This hyperbolic statement is

⁵ Paragraph 3 of the Port's confidentiality agreement with the unnamed company states: "To the extent permitted by law, and except as provided in Section 4, the Port agrees to maintain the [redacted] Confidential Information as confidential . . ." (emphasis added). Paragraph 4.1 states:

4. Nothing in this Agreement shall prohibit the disclosure of Port Confidential Information or the [redacted] Confidential Information:
- 4.1 If disclosure of such confidential information is required by law, including but not limited to disclosure required by court order or to the extent required by the rules and regulations of any recognized stock exchange; provided, however, that before disclosing such confidential information pursuant to law, the party desiring or being required to disclose confidential information shall give the other party notice as soon as possible and an opportunity to intervene or otherwise take action to protect its interests; or

1 contrary to the actions of virtually every competitor port along the Columbia River who
2 complied with the law, produced public records, and still has active coal terminal proposals.

3 In addition to the Port of St. Helens, in 2011 Riverkeeper sent twenty-one (21) public
4 records requests to Columbia River public ports in Oregon, Washington, and Idaho. Decl. of
5 Brett VandenHeuvel (hereafter "VandenHeuvel Decl.") at ¶ 10. The public records requests
6 were similar to the March 29, 2011 request to the Port of St. Helens. *Id.* Every port with
7 responsive documents sent Riverkeeper what ultimately amounted to hundreds of public records
8 describing proposals for coal export terminals on the Columbia River. *Id.* Aside from a handful
9 of documents withheld on the basis of attorney-client privilege, the Port of St. Helens was the
10 **only** port that claimed such public records were exempt from disclosure. *Id.*

11 For example, in response to a virtually identical public records request under ORS
12 192.410 *et seq.*, the Port of Morrow, an Oregon port located on the Columbia River, produced
13 every public record requested by Riverkeeper. This included detailed communications between
14 the port and a coal export company that ultimately executed a lease with the port in May 2011.
15 Second Decl. of Lauren Goldberg ("Second Goldberg Decl.") at 2, ¶ 3, SJ Ex. N.

16 The voluminous public records produced by the Port of St. Helens' competitor ports in
17 Washington State also undermines the Port's theory that, as a matter of law, the public interest in
18 jobs and tax revenue would be harmed by disclosing public records. In response to a series of
19 public records requests by Riverkeeper, the Ports of Kalama, Woodland, Vancouver and

1 Longview produced large volumes of public records detailing proposals for coal export
2 terminals, including detailed descriptions of business and marketing plans. *Id.* at 2 – 5, ¶¶ 5-16.⁶

3 For example, in response to Riverkeeper’s first public records request in September 2010,
4 the Port of Kalama produced over 100 documents, including emails between the port and
5 prospective coal export businesses, presentations by coal companies describing proposed coal
6 export plans at the port, and letters from coal export companies describing detailed business
7 plans. *See* Second Goldberg Decl. at 3, ¶ 7, SJ Ex. Q (September 29, 2010 letter from Port of
8 Kalama responding to Riverkeeper records request, including four page computer screen shots of
9 over 100 documents disclosed in records response); *id.* at ¶ 8, SJ Ex. R (an excerpt of public
10 records produced by the Port of Kalama, including letters from coal export companies describing
11 detailed business plans for coal terminals, presentation by coal terminals describing physical
12 layout and dust suppression at proposed coal terminal, and other communications describing coal
13 terminal business plans).

14 The Ports of Vancouver, Longview, and Woodland also produced similar public records
15 describing proposals for coal export terminals, internal port communications regarding the
16 proposals, and documents describing the due diligence process. *See* Second Goldberg Decl. at 3
17 – 5, ¶¶ 10, 13, 16, SJ Ex. T, W, Y. The competitor ports, therefore, complied with the law and
18 did not argue that disclosing records would “destroy the ability” to do business.

19 //

20 //

⁶ Washington Public Records Act, RCW 42.56 *et seq.*, contains similar exemptions to the Oregon statute. *See* RCW 42.56.270 (exempting from disclosure certain financial, commercial, and proprietary information).

1 **4. Public Records Act case law does not support the Port's argument**
2 **that, as a matter of law, the public interest will be harmed by**
3 **disclosure.**
4

5 Relying on an Attorney General order in *Burr/Freshour*, the Port argues that “[i]n this
6 case, the court must ‘weigh’ the Port’s interest in preserving confidential information protected
7 by contract (signed confidentiality agreements) against Riverkeeper’s interest in monitoring
8 government and educating the public regarding these issues.”. *See* Def. Br. at 8. The Port is
9 mistaken.⁷ In fact, the Attorney General’s order did not weigh the private interests of the public
10 body, but instead “weighed the **competing aspects** of the public interest.” Attorney General’s
11 Manual, App. F-34 (summarizing outcome in *Public Records Order*, Jan, 15, 1997,
12 *Burr/Freshour*) (emphasis added). Furthermore, the Port incorrectly describes the *Burr/Freshour*
13 Attorney General order as a “case” decided by a “court.” Def. Brief at 7. In fact, the
14 *Burr/Freshour* order is an administrative order of the Attorney General. *See* Manual, App. F-34
15 (summarizing outcome in *Public Records Order*, Jan, 15, 1997, *Burr/Freshour*).

16 The Port also cites to the court of appeals decision in *Premier Technology v. Oregon*
17 *State Lottery*, 136 Or App 124, 901 P2d 883 (1995), for the proposition that disclosing public
18 records requested by Riverkeeper will harm the public interest as a matter of law. As
19 Riverkeeper explained in its opening brief, the procedural posture and facts in *Premier*
20 *Technology* are distinguishable from the instant case. *See* Pl. Br. at 24.

⁷ Unlike other exemptions from disclosure, the confidentiality exemption does not require courts to balance the public interest in disclosure against the public body’s interest in nondisclosure. *Compare* ORS 192.502(1) (stating that “[t]his exemption shall not apply unless the public body shows that in the particular instances the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.”) to ORS 192.502(4) (stating that the exemption can apply if, among other factors, “the public interest would suffer by the disclosure.”).

1 In *Premier Technology*, the court was addressing a contract dispute between a public
2 body and a business. Premier Technology filed a motion to compel production of sensitive
3 business records, including tax returns and bank account numbers, of a business competitor.
4 The court sided with the Oregon State Lottery and indicated the motion should be denied. The
5 *Premier Technology* court stated that the documents at issue were exempt under the Public
6 Records Act's confidentiality exemption, because disclosing such highly sensitive business
7 information to a business competitor "could discourage video lottery terminal distributors from
8 applying for contracts with defendant, thereby reducing competition for video lottery terminals."
9 136 Or App at 135. In contrast to *Premier Technology*, the case at hand does not involve tax
10 returns or bank account records, and it does not involve a requestor who is a business competitor.

11 In addition, the *Premier Technology* court did not hold that the public interest is always
12 harmed anytime a member of the public requests records which involves a public body's
13 interaction with a business. To the contrary, as the Oregon Supreme Court and Court of Appeals
14 cases outlined in Riverkeeper's opening brief make clear, trial courts must scrutinize the alleged
15 harm to the public interest based on the statute's presumption in favor of disclosure, the supreme
16 court's directive to interpret exemptions narrowly in favor of disclosure, and based on the
17 evidence in support of the public body's argument that disclosure will harm the public interest.
18 *See Oregonian Publishing Co. v. Portland School Dist.*, 329 Or 393, 401 – 403, 987 P2d 480
19 (1999) (holding that city could not rely on exemptions under ORS 192.502(9) and ORS
20 192.340.850(8) to withhold public records relating the investigation of alleged misuse and theft
21 of school property by district employees); *Gray v. Salem-Keizer, supra*, 139 Or App at 565 – 66
22 (holding that school district could withhold records under ORS 192.502(4) and rejecting
23 argument that disclosure of job reference documents would have a "chilling effect" on ability to

1 screen job applicants); *City of Portland v. Oregonian Publishing Co.*, 200 Or App 120, 122, 112
2 P3d 457 (2005) (rejecting city's reliance on ORS 192.502(1) to exempt public records from
3 disclosure where city argued that public employees will be more likely to evaluate their
4 supervisors, subordinates, and colleagues with candor if job evaluations are not subject to
5 disclosure). Overall, Public Records Act case law does not support the Port's argument that, as a
6 matter of law, the public interest in jobs and tax revenue will be harmed by disclosure.

7 **5. A particular company's preference for interacting with a government body**
8 **in secret is not grounds for a finding of harm to the public interest.**
9

10 It is not appropriate to allow an apparent threat to "take its ball and go home" by an
11 unnamed corporation, such as the one described in the Port's declarations, to suffice as evidence
12 that the public interest would be harmed by disclosure. The Port argues that the unnamed
13 company will not engage in business with the Port unless every record requested by Riverkeeper
14 is withheld. *See* Decl. of Patrick Trapp ("Trapp Decl.") at 1 – 2, ¶ 4 (testifying to hearsay,
15 specifically that he has "been directly informed by a company which the Port has a signed
16 confidentiality agreement with that if their information is revealed then that company would no
17 longer pursue a project with the Port."). To accept this sort of alleged "threat" as a basis for a
18 finding of harm to the public interest would create bad policy that is fundamentally inconsistent
19 with Oregon's open government laws.

20 If a threat could suffice as evidence of harm to the public interest, a developer could
21 threaten to walk away from the table any time it wished to conduct secret business with a public
22 body. The public body could then claim that the public interest would suffer by disclosure. The
23 result would be an absurdly overbroad confidentiality exemption. In fact, the legislature adopted
24 specific, narrow exemptions. Those exemptions already strike any necessary balance between

1 fostering business development and open government. *See supra* at 8 – 9 (describing other
2 exemptions to disclosure).

3 Relying on the unnamed company's threats, the Port exaggerates the alleged harm to the
4 public interest when it claims that the Court has "proof" that jobs would be lost if the public
5 records are released. Def. Br. at 8 ("The court has proof through the attached written
6 declarations that jobs will be lost if the information is released."). Future jobs that may or may
7 not ultimately result from the unnamed company's consideration of the Port are entirely
8 speculative. In fact, the Trapp Declaration contradicts the Port's own argument, stating:

9 In looking at the life cycle between an inquiry and an approved public project, I estimate
10 that less than nine percent of credible inquiries (over the last four years) have actually
11 matured into an approved public project with the Port. Of those which signed a CA
12 [Confidentiality Agreement], only two inquiries have matured into signing a lease with
13 the Port.

14
15 Trapp Decl. at 2, ¶ 6. In essence, the Port is really arguing that disclosure of the records will
16 potentially result in the loss of what is already at most a 9% **chance** of the coal company
17 deciding to locate a project at the Port. Loss of a 9% **possibility** cannot meet the "daunting
18 burden" that the Port is required to meet in order to show that withholding records will harm the
19 public interest.

20 **6. The possibility of future public processes related to the unnamed company's**
21 **project is irrelevant to whether the public interest would be harmed by**
22 **disclosure.**

23
24 The Port's duty to comply with the Public Records Act is independent of its duties to
25 comply with other laws, such as the Public Meetings Act, ORS192.610 *et seq.* The Port,
26 however, appears to have overlooked this critical point.

27 The Port argues that the public interest in disclosure will not be harmed if the Port
28 withholds records because, if the unnamed company's project moves forward, the Port will have

1 to—at some point—vote on the matter and the public will have the opportunity to learn about the
2 project when the Port enters a lease or when the company applies for permits. The fact that there
3 may be future public process related to this project does not change or reduce the Port's statutory
4 obligations under the Public Records Act in any way, and the Court should reject the Port's
5 attempted argument to the contrary.

6 First, the potential for future public processes is not part of the five-part confidentiality
7 exemption test. The confidentiality exemption does not include an element that calls for courts
8 to consider factors that mitigate the harm to the public interest when a public body refuses to
9 disclose records.

10 Second, the Port provides no authority for its argument that the future possibility of a
11 public process under another law somehow preempts the Port's duty under the Public Records
12 Act. In fact, the Port's duty to disclose public records pursuant to the Public Records Act is
13 **independent** of its duty to hold public meetings under the Public Meetings Act, or other
14 agencies duties to hold public processes related to permits or land use authorizations under other
15 laws.

16 Third, the Court should disregard the Port's argument because the Port assumes without
17 support that the **information** contained in the requested records will become available in the
18 future. Riverkeeper sought actual records, not a summary of records or some other form of
19 information screened or filtered by a public body. The Port ignores the fact that the Public
20 Records Act calls for the disclosure of **public records**, not for a public vote or a public
21 discussion of information.

22 //

1 **7. The Court should disregard the Port's argument that Riverkeeper's interests**
2 **are not harmed by nondisclosure because it is irrelevant and inaccurate.**

3
4 In an attempt to downplay the effect of withholding public records, the Port argues that
5 nondisclosure does not harm Riverkeeper's interests. Def. Br. at 13 – 14 (“Riverkeeper has
6 already shown its ability to do without this confidential information being released.”). This
7 argument is both irrelevant and factually incorrect.

8 The issue before this Court is whether the Port has carried its burden to demonstrate that
9 the public interest would suffer by disclosure of the public records requested. *See* ORS
10 192.502(4). While the legislature could have added an element to the confidentiality exemption
11 that called on the court to weigh the effect of nondisclosure on the requestor, it did not. The
12 Port's argument, which is really an attempt to sway the Court's analysis with a “no harm, no
13 foul” pitch, is legally inappropriate and should be disregarded.

14 Even if the Port's argument had some legal basis, which it does not, the Court could not
15 engage in the analysis that the Port requests as part of a summary judgment motion. How much
16 Riverkeeper's interests have or would suffer due to lack of disclosure for over a year is a factual
17 dispute. Even if the “Google” searches the Port conducted were somehow persuasive, these facts
18 are not appropriate for summary judgment.

19 Moreover, the Port grossly underestimates the effect of withholding public records.
20 Limiting access to all records requested limits the ability of Riverkeeper (or of the press or other
21 citizens) to understand (i) what type of facility is being proposed, (ii) what type of impacts that
22 specific facility might have on the Columbia River and other river communities, (iii) what the
23 business practices of the project proponent have been elsewhere and are likely to be here, and
24 (iv) how the Port is going about interacting with this particular project proponent. For the

1 reasons explained in Riverkeeper's opening brief and herein, the Port has wholly failed to meet
2 and carry its heavy burden to demonstrate that the public interest will be harmed by disclosure.
3 In turn, the Port cannot withhold any public records under the confidentiality exemption.

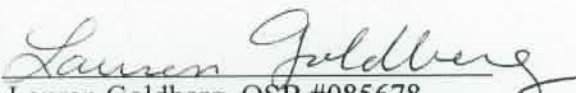
4 **III. CONCLUSION.**

5 The Public Records Act's captures "the right of the citizens to monitor what elected and
6 appointed officials are doing on the job." *Jensen v. Schiffman*, 24 Or App 11, 17, 544 P2d 1048
7 (1976). "Oregon has a long-standing policy in favor of access to public records. The general
8 statement of legislative policy regarding public records has remained virtually unchanged for 140
9 years." *Oregonian Publishing Co. v. Schraw*, 329 Or 393, 398, 987 P2d 480 (1999).

10 Like other exemptions for disclosure, the plain language of the confidentiality exemption
11 creates a high bar for public bodies to withhold documents. In the instant case, the Port fails to
12 carry its heavy burden to demonstrate that the exemption applies to the public records requested
13 by Riverkeeper. For all the reasons outlined in Riverkeeper's opening brief and herein, this
14 Court should grant Riverkeeper's Motion for Partial Summary Judgment, deny the Port's Cross
15 Motion for Summary Judgment, and order the Port to disclose every public record requested by
16 Riverkeeper.

17 Dated this 5th day of January 2012.

18
19 Signed by:


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