

FILED: December 17, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JOHN BROWN, BOB CASSIDY, RICH CUNNINGHAM, JOANN ERNST, and RON FARMER, as Commissioners of the Eugene Water & Electric Board, an Oregon municipal corporation,
Plaintiffs-Respondents,

and

SENECA SUSTAINABLE ENERGY, LLC, an Oregon limited liability company,
Intervenor-Respondent,

v.

GUARD PUBLISHING COMPANY, an Oregon corporation, dba Register-Guard,
Defendant-Appellant,

and

ALEXANDER GARDNER, as Lane County District Attorney,
Defendant.

Lane County Circuit Court
161026544

A149933

Karsten H. Rasmussen, Judge.

Argued and submitted on February 12, 2014.

Jack L. Orchard argued the cause for appellant. With him on the briefs were Adele J. Ridenour and Ball Janik LLP.

Eric S. DeFreest argued the cause for respondents John Brown, Bob Cassidy, Rich Cunningham, Joann Ernst, and Ron Farmer. With him on the brief were Joel S. DeVore and Luvaas Cobb.

Rohn M. Roberts argued the cause for respondent Seneca Sustainable Energy, LLC. With him on the briefs were Aaron J. Noteboom and Arnold Gallagher PC.

Before Duncan, Presiding Judge, and Haselton, Chief Judge, and Lagesen, Judge.*

DUNCAN, P. J.

Reversed and remanded.

*Haselton, C. J., *vice* Wollheim, S. J.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant

- No costs allowed.
 Costs allowed, payable by Respondents.
 Costs allowed, to abide the outcome on remand, payable by
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1 DUNCAN, P. J.

2 This case involves a public records request by defendant Guard Publishing
3 Company (dba The Register-Guard), who sought disclosure of an energy purchase
4 contract between respondents, the Commissioners of the Eugene Water and Electric
5 Board (EWEB) and Seneca Sustainable Energy, LLC (Seneca). EWEB denied the
6 records request and eventually initiated this action for injunctive and declaratory relief to
7 establish that the contract, in its entirety, is exempt from disclosure under the Oregon's
8 public records law, ORS 192.410 to 192.505. Among other exemptions, EWEB relied on
9 ORS 192.502(26), which exempts from disclosure certain "[s]ensitive business,
10 commercial or financial information" furnished to or developed by a public body who,
11 like EWEB, is engaged in the business of providing electricity, if "disclosure of the
12 information would cause a competitive disadvantage for the public body or its retail
13 electricity customers."

14 Seneca intervened in the action and, along with EWEB, moved for
15 summary judgment on the theory that the entire contract is exempt from disclosure under
16 ORS 192.502(26). The Register-Guard opposed their motions and filed its own cross-
17 motion for summary judgment, arguing that EWEB had not carried its burden to
18 demonstrate that all of the information within the contract--as opposed to the contract as a
19 whole--is exempt from disclosure. The trial court ruled in favor of EWEB and Seneca
20 and entered a judgment declaring that the entire contract is exempt, which The Register-
21 Guard now appeals. For the reasons that follow, we conclude that the summary judgment

1 record permits competing inferences as to whether all of the information within the
2 contract was "[s]ensitive business, commercial or financial information," the disclosure
3 of which "would cause a competitive disadvantage for" EWEB or its retail customers.
4 Accordingly, we reverse and remand.

5 I. BACKGROUND

6 EWEB is a municipal utility that provides electricity service to customers
7 in the Eugene area by contracting with entities that buy and sell wholesale energy.
8 Seneca is a private company that owns and operates a facility that generates biomass
9 energy. In 2010, EWEB announced that it had entered into a contract with Seneca for the
10 purchase of biomass-produced electricity. *See* ORS 261.348 (authorizing people's utility
11 districts and municipal electric utilities to "enter into transactions * * * for the
12 production, supply or delivery of electricity on an economic, dependable and cost-
13 effective basis").¹ The Register-Guard requested a copy of that contract from EWEB, but

¹ In full, ORS 261.348 provides:

"(1) Notwithstanding any other law, people's utility districts and municipal electric utilities may enter into transactions with other persons or entities for the production, supply or delivery of electricity on an economic, dependable and cost-effective basis, including financial products contracts and other service contracts that reduce the risk of economic losses in the transactions. This subsection does not authorize any transaction that:

"(a) Constitutes the investment of surplus funds for the purpose of receiving interest or other earnings from the investment; or

"(b) Is intended or useful for any purpose other than the production, supply or delivery of electricity on a cost-effective basis.

"(2) Nothing in subsection (1) of this section prohibits a people's

1 EWEB denied the request on the ground that the contract was exempt from the disclosure
2 requirements of the public records law.

3 The Register-Guard then petitioned the Lane County district attorney to
4 review the contract to determine whether it could be withheld from public inspection.
5 *See* ORS 192.460 (providing that avenue of review in certain circumstances for persons
6 who are denied the right to inspect public records). After reviewing the contract, the
7 district attorney ordered EWEB to disclose it. In response, EWEB and, later, Seneca as
8 an intervenor, sought injunctive and declaratory relief from that order in the Lane County
9 Circuit Court, alleging that the entire contract is exempt from disclosure under various
10 provisions of the public records law and that EWEB was under no obligation to disclose
11 any of its contents. *See* ORS 192.450(2) (requiring a public body to comply with a
12 disclosure order within seven days of the order, unless the public body issues a notice of
13 its intention to institute proceedings for injunctive or declaratory relief). EWEB and
14 Seneca relied on, among other exemptions, ORS 192.502(26), which exempts from
15 disclosure the following "public records":

16 *"Sensitive business, commercial or financial information* furnished to or
17 developed by a public body engaged in the business of providing electricity
18 or electricity services, if the information is directly related to a transaction
19 described in ORS 261.348, or if the information is directly related to a bid,
20 proposal or negotiations for the sale or purchase of electricity or electricity
21 services, and disclosure of the information would cause a competitive

utility district or a municipal electric utility from entering into any
transaction for the acquisition, construction, improvement or equipping of a
renewable energy facility or for the purchase or sale of electricity, electrical
capacity or renewable energy certificates."

1 disadvantage for the public body or its retail electricity customers. This
2 subsection does not apply to cost-of-service studies used in the
3 development or review of generally applicable rate schedules."

4 (Emphasis added.)

5 The parties then filed cross-motions for summary judgment that eventually
6 focused on a relatively narrow question: whether, as EWEB and Seneca contended, the
7 contract should be treated as exempt in its entirety or whether, as The Register-Guard
8 argued, EWEB was required to separate out, and disclose, any nonexempt material within
9 the contract--in other words, whether EWEB was required to produce a redacted version
10 of the contract. *See* ORS 192.505 ("If any public record contains material which is not
11 exempt under ORS 192.501 and 192.502, as well as material which is exempt from
12 disclosure, the public body shall separate the exempt and nonexempt material and make
13 the nonexempt material available for examination.").

14 In its summary judgment motion, The Register-Guard explained its
15 objection to EWEB and Seneca's "absolutist" position regarding disclosure:

16 "The Court should be clear about The Register-Guard's position in
17 this case, given EWEB's response. The Register-Guard has seen nothing
18 from the actual contract * * *. Because EWEB has chosen to respond with
19 claims of total confidentiality, The Register-Guard is neither able (nor
20 required) to limit its request to specific portions of the contract. The
21 Register-Guard is at a point where it does not know about what is actually
22 included (or not) in the contract and will not be so informed until EWEB
23 complies with ORS 192.505. In short, specific contentions about specific
24 parts of the contract are premature. It is EWEB's responsibility under the
25 Public Records Law (not The Register-Guard's) to narrow the records
26 disclosure issues. EWEB has chosen not to do so."

27 EWEB and Seneca, meanwhile, filed their own motions for summary

1 judgment in which they argued that ORS 192.502(26) and other exemptions applied to
2 "the entire [c]ontract" and that "EWEB is not required to separate 'non-exempt' from
3 'exempt' material under ORS 192.505." (Quoting Seneca's response and cross-motion for
4 summary judgment.) In support of their motions, they submitted affidavits from Rick Re,
5 the CEO and Senior Vice President of Seneca, and Clay Norris, EWEB's director of its
6 Power Resources Division. In Re's affidavit, he averred that the contract contained "trade
7 secrets," which Seneca and EWEB had agreed to keep (and had kept) confidential, and
8 that disclosure of the contract would harm Seneca, as well as EWEB and its customers,
9 because, among other reasons, public disclosure of the terms of the contract would
10 disadvantage Seneca and EWEB when they negotiated future contracts with others:

11 "The Contract contains confidential and proprietary information of
12 Seneca which are trade secrets and which if disclosed would cause
13 substantial harm to Seneca and which would place Seneca at a competitive
14 disadvantage with its competitors and suppliers in both the energy and
15 forest product markets.

16 "As part of the negotiations and agreement, EWEB and Seneca
17 agreed that the terms and conditions of the Contract will be submitted and
18 kept as confidential. Under the Contract, EWEB is contractually obligated
19 to Seneca to maintain the confidentiality of the Contract and the
20 information contained therein.

21 "Seneca received comparable, competing offers from EWEB and a
22 private entity to purchase its electricity. Seneca agreed to sell its electricity
23 to EWEB rather than the private entity only after negotiating the
24 confidentiality provisions of its agreement with EWEB, and reviewing the
25 Public Records Laws and determining that the terms of the sale would be
26 exempt from disclosure. If Seneca's review and analysis of the public
27 records exemptions had led it to believe that the terms of the sale would
28 have been subject to disclosure, Seneca very likely would not have sold its
29 electricity to EWEB.

1 "EWEB and Seneca have strictly maintained the confidentiality of
2 the Contract. To date, the Contract and its terms have never been disclosed
3 to any party other than to select individuals at Seneca and EWEB and their
4 legal representatives.

5 * * * * *

6 "Disclosure of the Contract will harm the public interest and would
7 put EWEB and its customers at a competitive disadvantage because it will
8 discourage Seneca, and other companies, from entering into public
9 contracts with EWEB for the sale of power. For example, if the Contract
10 were disclosed it would place Seneca at a competitive disadvantage in the
11 purchase and sale of residual products such as bark, sawdust, planer
12 shaving[s] and chips, also used for fuel at the renewable energy facility.
13 The contracts for fuel supply are extremely competitive and are
14 renegotiated every 90 days. If the price of electricity sold by Seneca
15 becomes public, then fuel suppliers would be able to employ reverse
16 calculations and determine the price threshold for fuel supply that they sell
17 to Seneca's plant. Similarly, buyers of Seneca's residual products that, as an
18 alternative, could be used as fuel for the renewable energy plant, will be
19 able to compute the threshold at which it is economical for Seneca to sell to
20 them instead of using Seneca's fuel for the renewable energy plant.
21 Likewise, the renewable energy plant will also rely upon slash from
22 surrounding timberland operations for fuel. Competitors for this fuel,
23 armed with pricing information, will be able to determine Seneca's
24 breakeven for purposes of outbidding Seneca for this fuel source.
25 Consequently, disclosure would harm EWEB's ability to attract bidders,
26 such as Seneca who knew their agreed upon contractual terms would be
27 openly available to be used against them. A lack of bidders would increase
28 the costs of energy to EWEB and its customers and adversely impact
29 EWEB's ability to obtain sufficient and qualified suppliers of renewable
30 energy as required by ORS Chapter 469A.

31 "Disclosure of the Contract will reveal EWEB's sensitive business,
32 commercial and financial information to its competitors and other suppliers
33 of electricity placing EWEB, and its customers, at a competitive
34 disadvantage when bargaining or competing for electrical purchase or
35 supply contracts. But for the disclosure, those competitors and suppliers
36 would not otherwise know such sensitive information. By the same token,
37 EWEB's competitor and suppliers, who are privately owned, would not
38 have to reveal the terms and conditions of their agreements placing them at
39 a competitive advantage over EWEB and its customers."

1 (Paragraph numbering omitted.)

2 Norris's affidavit, meanwhile, included averments regarding negotiation of
3 power purchase agreements:

4 "Negotiations for a power purchase agreement are very competitive
5 in the energy marketplace involving the discussion and development of
6 sensitive business, commercial and financial information, including trade
7 secrets, which strive to culminate in a transaction for the purchase of energy
8 by power purchase agreement containing negotiated terms and conditions
9 tailored to the specific generation project and the needs of EWEB on behalf
10 of its customers. At EWEB, these discussions and information are limited
11 to key personnel who are involved in the power purchase transaction.

12 "The disclosure of the transaction sought by Guard Publishing will
13 cause a competitive disadvantage to EWEB and affect its retail electric
14 customers because energy developers do not wish to reveal their negotiable
15 terms, limits and strategies in power purchase transactions by disclosure to
16 the public and their competitors in the marketplace. Negotiations for power
17 purchase transactions are multi-faceted, commonly including negotiation of
18 operating conditions, qualifications to satisfy Oregon's Renewable Energy
19 Act, environmental attributes such as renewable energy certificates,
20 mitigation strategies, price calculation and seasonal variations, delivery
21 requirements and other terms and conditions tailored to individual
22 generation projects or EWEB needs.

23 "If power purchase transactions such as the EWEB-Seneca
24 transaction were publicly disclosed it is probable that the generation
25 developers would raise the price of their energy, be less inclined to
26 negotiate certain terms and conditions, or choose not to enter power
27 purchase transactions with EWEB."

28 (Paragraph numbering omitted.)

29 In reply to EWEB's and Seneca's submissions, The Register-Guard offered,
30 by way of a declaration from its counsel, a table that identified seven "electric power
31 purchase agreements between EWEB and various other renewable energy source vendors
32 dating 2001-2010, which have previously been made available to The Register-Guard,

1 along with references to specific types of information contained in such agreements."²
2 Based, in part, on EWEB's disclosure of those agreements--some of which had been
3 made available with redactions--The Register-Guard argued in its reply brief that
4 "[d]isclosure of information from [those] contracts was both contemplated and dealt with.
5 Obviously, potential disclosures were not deterrents to contracting with EWEB."

6 At the summary judgment hearing, The Register-Guard took the position,
7 consistent with its briefing, that EWEB had "missed a step in this process" by refusing to
8 disclose the whole document rather than redacting only those specific parts of the
9 contract that are exempt from disclosure. With respect to ORS 192.502(26) specifically,
10 which The Register-Guard referred to as the "electricity generation exemption," it
11 explained, in part:

12 "Number 1, it has to be sensitive information of a business, financial,
13 or commercial nature. *It's not everything in a contract.* It's limited to that
14 type of information, and it must be sensitive.

15 "Secondly, the exemption ends with the other qualifier, that
16 disclosure of this sensitive information would create a competitive
17 disadvantage to EWEB or to its customers. *And again, we're talking about*
18 *the entire contract.* We're not talking about a specific portion of the
19 contract that has been identified. We're talking about the entire contract,
20 the release of any information from the contract, creating this competitive
21 disadvantage. *And I think it too falls of the same problem with how does*
22 *disclosure of a whole lot of this contract create any competitive*
23 *disadvantage."*

24 (Emphases added.)

² The Register-Guard offered to make complete copies of the documents available upon request and brought copies of those agreements to the summary judgment hearing, but the trial court declined to review them.

1 Both EWEB and Seneca maintained at the hearing that the entire contract is
2 exempt without any need for redaction. In fact, Seneca took the position that the issues
3 before the court had narrowed to a single question: "whether or not the Register-Guard is
4 entitled to a redacted version of this contract," which "basically directs our focus on ORS
5 192.502(26)." That exemption, Seneca argued, provides "an unconditional exemption"
6 that is not subject to redaction under ORS 192.505.

7 After taking the case under advisement, the trial court issued a letter
8 opinion in which it agreed with EWEB and Seneca that the entire contract is exempt from
9 disclosure under ORS 192.502(26). The court concluded that "EWEB and Seneca have
10 gone to great lengths and exercised a high degree of discretion to keep the *actual*
11 Contract and its agreed-upon terms confidential," thereby meeting EWEB's burden to
12 show that the contract "in its entirety" is sensitive business, commercial, or financial
13 information for purposes of the exemption. (Emphasis in original.) Furthermore, the
14 court concluded, EWEB met its burden to show that disclosure of the contract would
15 create a competitive disadvantage for "EWEB and its retail electricity customers because
16 it could harm EWEB's ability to attract bidders, such as Seneca, thereby reducing
17 competition for power purchase agreements." That is, the court ruled that "[a]
18 competitive disadvantage is created for EWEB and its retail customers when private
19 industry believes that its contracts will be disclosed as a matter of course pursuant to
20 Oregon's Public Records Laws." "Additionally," the court explained, "disclosure of the
21 Contract would reveal EWEB's sensitive business, commercial and financial information

1 to its competitors and other suppliers of electricity, which would place EWEB and its
2 customers at a competitive disadvantage over EWEB's privately-owned competitors, who
3 are not subject to the Public Records Laws, when bargaining or competing for electrical
4 purchase or supply contracts." Accordingly, the court ruled:

5 "EWEB has met its burden to show that the Contract, in its entirety,
6 should be exempt from disclosure pursuant to ORS 192.502(26). To be
7 clear, the Court does not hold that all power purchase agreements between
8 EWEB and a private entity that buys or sells wholesale electricity are
9 categorically exempt pursuant to ORS 192.502(26). The Court merely
10 holds that, on the facts here, this Contract is exempt from disclosure
11 pursuant to ORS 192.502(26)."³

12 The trial court entered a judgment that incorporated that letter ruling, which The
13 Register-Guard now appeals.

14 II. ANALYSIS

15 A. *Standard of Review*

16 In considering the merits of The Register-Guard's appeal, our standard of
17 review bears emphasis. ORS 192.490(1) provides that, in public records proceedings like
18 this one, "[T]he court shall determine the matter *de novo* and the burden is on the public
19 body to sustain its action." The Register-Guard submits that we, too, review the case *de*
20 *novo*, but that ignores the procedural posture of this case; the standard is actually more
21 favorable to The Register-Guard than that. Because this case is before us on the grant of
22 a motion for summary judgment, we review the record to determine whether there are

³ The trial court also stated that, "[b]ecause the Court finds that the contract is exempt, in its entirety, under ORS 192.502(26), the Court does not address [the] exemptions [in ORS 192.502(4) and ORS 192.501(2)]."

1 any genuine issues of material fact and whether EWEB and Seneca are entitled to
2 judgment as a matter of law. *Jones v. General Motors Corp.*, 325 Or 404, 420, 939 P2d
3 608 (1997); *see also Kluge v. Oregon State Bar*, 172 Or App 452, 457, 19 P3d 938
4 (2001) (explaining, in the context of a public records proceeding, that "we do not ignore
5 the fact that this case is on appeal from a summary judgment" and "[c]onsequently, we
6 review the summary judgment to determine whether there are any genuine issues of
7 material fact and whether the moving party is entitled to judgment as a matter of law").
8 "That standard is met when, viewing the facts in the light most favorable to the
9 nonmoving party, no reasonable [trier of fact] could return a verdict for that party."
10 *Hagler v. Coastal Farm Holdings, Inc.*, 354 Or 132, 140, 309 P3d 1073 (2013).

11 B. *Overview of the Exemption and the Redaction Requirement*

12 In light of our standard of review, the question framed on appeal is this: Do
13 the facts, viewed in the light most favorable to The Register-Guard, compel the
14 conclusion that the entire contract is exempt from disclosure under ORS 192.502(26)?
15 The answer turns on how that exemption functions in the context of Oregon's public
16 records law.

17 Under Oregon law, "[e]very person has a right to inspect any public record
18 of a public body in this state, except as otherwise expressly provided by ORS 192.501 to
19 192.505." ORS 192.420(1). A "public record" "includes *any writing that contains*
20 *information relating to the conduct of the public's business*, including but not limited to
21 court records, mortgages, and deed records, prepared, owned, used or retained by a public

1 body regardless of physical form or characteristics." ORS 192.410(4)(a) (emphasis
2 added). A "writing" "means handwriting, typewriting, printing, photographing and every
3 means of recording, including letters, words, pictures, sounds, or symbols, or
4 combination thereof, and all papers, maps, files, facsimiles or electronic recordings."
5 ORS 192.410(6).

6 ORS 192.501 and ORS 192.502, in turn, identify certain "public records
7 exempt from disclosure." ORS 192.501 (setting forth conditional exemptions); ORS
8 192.502 (setting forth unconditional exemptions). Under the statutory scheme,
9 "disclosure is the rule. Exemptions from disclosure are to be narrowly construed."
10 *Guard Publishing Co. v. Lane County School Dist.*, 310 Or 32, 37, 791 P2d 854 (1990).
11 Moreover, a public body that withholds public records from disclosure has the burden of
12 proving that exemptions apply. ORS 192.490(1); *Mail Tribune, Inc. v. Winters*, 236 Or
13 App 91, 95, 237 P3d 831 (2010). "To satisfy that burden, a public body must establish
14 exemptions from disclosure 'on an individualized basis.'" *Id.* at 95 (quoting *Guard*
15 *Publishing Co.*, 310 Or at 39).

16 As will later prove important, each of the exemptions in ORS 192.502 is
17 worded slightly differently. Some of the exemptions describe particular types of
18 documents and categorically exempt those documents from disclosure. *E.g.*, ORS
19 192.502(32) (exempting county election security plans); ORS 192.502(24) (exempting,
20 among other records, "[c]redit reports," "[p]roject appraisals," "[a]rticles of incorporation,
21 partnership agreements and operating agreements," and "[c]ommitment letters"); ORS

1 192.502(7), (15) (exempting certain "reports"). Other exemptions, however, are phrased
2 in terms of particular types of data or information within public records. *E.g.*, ORS
3 192.502(3) ("Public body employee or volunteer addresses, Social Security numbers,
4 dates of birth and telephone numbers contained in personnel records maintained by the
5 public body that is the employer or the recipient of volunteer services."). Thus, although
6 the definition of "public records"--and, by incorporation, the exemptions, including ORS
7 192.502(26)--are phrased in terms of whether a writing "contains" information related to
8 public business, the specific exemptions themselves may apply to a writing in whole or in
9 part.

10 The specific exemption at issue here, ORS 192.502(26), is phrased
11 primarily in terms of "information" rather than in terms of specific types of documents. It
12 exempts "the following public records" from disclosure:

13 "*Sensitive business, commercial or financial information* furnished
14 to or developed by a public body engaged in the business of providing
15 electricity or electricity services, if *the information* is directly related to a
16 transaction described in ORS 261.348, or if *the information* is directly
17 related to a bid, proposal or negotiations for the sale or purchase of
18 electricity or electricity services, and disclosure of *the information* would
19 cause a competitive disadvantage for the public body or its retail electricity
20 customers. This subsection does not apply to cost-of-service studies used
21 in the development or review of generally applicable rate schedules."

22 (Emphases added.) For purposes of this case, that exemption has two relevant
23 components: The information related to the electricity purchase (1) is "[s]ensitive
24 business, commercial or financial information" and (2) "the disclosure of the information
25 would cause a competitive disadvantage for the public body or its retail electricity

1 customers."

2 As previously noted, depending on the nature of the exemption, it is
3 possible for a single writing to contain information that qualifies for an exemption and
4 information that does not. ORS 192.505 recognizes that possibility and provides that,
5 "[i]f any public record contains material which is not exempt under ORS 192.501 and
6 192.502, as well as material which is exempt from disclosure, the public body shall
7 separate the exempt and nonexempt material and make the nonexempt material available
8 for examination." Thus, ORS 192.505 provides important context for understanding and
9 interpreting the scope of the disclosure exemptions in ORS 192.501 and ORS 192.502,
10 including ORS 192.502(26). Read in context with ORS 192.505, ORS 192.502(26)
11 exempts *only* that information within a writing that satisfies both requirements
12 (sensitivity of information and competitive disadvantage from disclosure), and a public
13 body is required to produce any material that does not.

14 C. *Application of the Exemption on this Summary Judgment Record*

15 According to The Register-Guard, the summary judgment record, which
16 does not include the contract itself, is simply too sparse to compel a conclusion that the
17 entire contract satisfies both requirements of the exemption--*i.e.*, that the entire contract
18 is "[s]ensitive business, commercial or financial information" the disclosure of which
19 "would cause a competitive disadvantage" to EWEB or its customers. In response,
20 EWEB and Seneca argue that the affidavits of Re and Norris, which we previously set out
21 in relevant part, ___ Or App at ___ (slip op at 5-7), are uncontroverted and establish that

1 the contract itself has been kept confidential and that disclosure of the contract, which is
2 the sum of negotiations, would create a competitive disadvantage to EWEB and its
3 customers. Moreover, they argue that EWEB is under no obligation to engage in what
4 Seneca describes as "ultra-redaction"--*i.e.*, an evaluation of each sentence or paragraph of
5 the contract--thereby frustrating the purpose of the exemption, which they contend was
6 enacted to protect precisely this type of document from disclosure. Having reviewed the
7 record, we agree with The Register-Guard that this case was not susceptible to summary
8 judgment.

9 Initially, we are not persuaded by EWEB and Seneca's arguments that the
10 contract is indivisible "information" for purposes of applying the exemption. EWEB and
11 Seneca argue that, because the contract is the culmination of the parties' negotiations, all
12 of the contract's provisions should be treated collectively as the "information" that
13 satisfies the exemption in this case. To the extent their argument is categorical--that
14 every power purchase agreement is the relevant "information" for purposes of ORS
15 192.502(26)--we find virtually no support for that reading in the text, context, or
16 legislative history of the exemption. *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d
17 1042 (2009) (describing our methodology for discerning the legislature's intended
18 meaning for a statute). As we indicated when describing the public records disclosure
19 scheme, ORS 192.502(26) is not phrased in terms of particular types of documents that
20 are categorically exempt. Rather, the legislature repeatedly used the term "information"
21 (four times) in ORS 192.502(26), and referred to "information" that is "directly related to

1 a transaction described in ORS 261.348" or "directly related to a bid, proposal or
2 negotiations for the sale or purchase of electricity or electricity services." That text,
3 which describes what the information in the writing "relate[s] to," suggests that the
4 legislature intended to create an exemption based on informational content rather than a
5 categorical exemption for certain types of documents.

6 The focus on "information" rather than the type or nature of a document
7 also suggests to us that the legislature understood the exemption to apply only to parts of
8 a writing--contracts included. The word "information" is commonly understood to mean

9 "something received or obtained through informing: such as **a** : knowledge
10 communicated by others or obtained from investigation, study, or
11 instruction **b** : knowledge of a particular event or situation :
12 INTELLIGENCE, NEWS, ADVICES <latest ~ from the battle front>
13 <securing ~ about conditions in the upper atmosphere> <~ bureau> **c** : facts
14 or figures ready for communication or use as distinguished from those
15 incorporated in a formally organized branch of knowledge : DATA
16 <reliable source of ~>."

17 *Webster's Third New Int'l Dictionary* 1160 (unabridged ed 2002). A single writing such
18 as a contract can include distinct and separable knowledge, intelligence, facts, or figures,
19 and is susceptible to the type of redaction described in ORS 192.505. Indeed, when read
20 in context with the redaction requirement and the definition of "public record" in ORS
21 192.410(4)(a), the most plausible interpretation of ORS 192.502(26) is that it expressly
22 shields only that "information" within the contract that satisfies the requirements of the
23 exemption, but it does not shield other material in the contract that is reasonably

1 severable from the exempt material.⁴ So, in the absence of any persuasive indicator of
2 contrary legislative intent,⁵ we construe the exemption narrowly to restrict only the
3 disclosure of information within the contract that satisfies the requirements of the
4 exemption.⁶ *Guard Publishing Co.*, 310 Or at 37 (stating that exemptions are construed

⁴ We appreciate that the obligation to separate exempt and nonexempt material can create difficulties parsing the contents of a document. In *Turner v. Reed*, 22 Or App 177, 186 n 8, 538 P2d 373 (1975), we noted the "variety of problems" that public bodies might face "in discharging their 'editing' responsibilities" under the statutory predecessor to ORS 192.505, including that "deleted portions of a document could possibly be inferred from the balance," and that "deletions may reach the point that it would be meaningless to disclose the balance." We explained that the statute should be interpreted to require "editing of documents when segregating exempt and nonexempt material is (1) reasonably possible; and (2) can be done so as to genuinely preserve the confidentiality of exempt material." *Id.* As we will explain, there has been no effort by the public body to consider redaction, so it is premature to consider, on this record, whether it is reasonably possible.

⁵ The legislative history of ORS 192.502(26) is not particularly illuminating. The statute was spurred by impending deregulation of the electricity market, and was intended to provide some measure of confidentiality surrounding the terms and conditions of open-market energy purchases by community-owned utilities. Seneca points to legislators' statements to the effect that free market conditions would give rise to a need for confidentiality regarding the terms and pricing of contracts. However, nothing in those statements or the remainder of the legislative history resolves the threshold question before us: whether the legislature intended to prevent disclosure of *all* information within an energy contract, or whether the legislature considered various parts of the contract, such as specific terms and pricing, to be separate "information," thereby protecting only that material that has been kept confidential and would create a competitive disadvantage if disclosed.

⁶ Our decision in *Port of Portland v. Ore. Center for Environ. Health*, 238 Or App 404, 243 P3d 102 (2010), *rev den*, 350 Or 230 (2011), does not assist EWEB and Seneca. In that case, we applied the exemption in ORS 192.502(9)(a), which exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." We concluded that an entire joint-defense agreement was "a confidential communication" for purposes of the exemption, thereby "dispos[ing] of defendants' argument that the Port

1 narrowly and that "we keep in mind that we are considering an exception to the general
2 rule favoring disclosure").

3 Our rejection of EWEB and Seneca's "all or nothing" theory--*i.e.*, that the
4 contract must be considered a singular piece of "information" under ORS 192.502(26)--
5 effectively resolves this appeal. That is because the affidavits of Re and Norris, which
6 are the foundation for EWEB's and Seneca's remaining arguments, are worded in terms of
7 the entire contract and say little about whether the disclosure of particular information
8 within that contract would cause a competitive disadvantage to EWEB or its customers.
9 For instance, Re averred that "[t]he Contract contains confidential and proprietary
10 information of Seneca which are trade secrets and which if disclosed would cause
11 substantial harm to Seneca and which would place Seneca at a competitive disadvantage
12 with its competitors and suppliers in both the energy and forest product markets."
13 However, viewed in the light most favorable to The Register-Guard--and read in a way
14 that is consistent with the arguments put forth in EWEB's and Seneca's summary
15 judgment motions--the affidavit does not establish that the contract contains *only* that
16 kind of information or other information that, if disclosed, would cause a competitive

should separate exempt and nonexempt material under ORS 192.505." 238 Or App at 413. However, our conclusion was driven by the nature of that particular exemption, and the fact that, for purposes of the attorney-client privilege, "the document itself can constitute a confidential communication. *Cf. State v. Riddle*, 330 Or 471, 478, 8 P3d 980 (2000) (stating that expert opinions not derived from a communication between the expert and the client or attorney were not privileged, and a communication is an interchange of thoughts or opinions)." 238 Or App at 411.

1 disadvantage.⁷

2 Norris's affidavit, likewise, is phrased in terms that reasonably can be read
3 to refer to the risk of disclosure of the contract *in toto*. He averred that "[t]he disclosure
4 of the transaction sought by Guard Publishing will cause a competitive disadvantage to
5 EWEB and affect its retail electric customers because energy developers do not wish to
6 reveal their negotiable terms, limits and strategies in power purchase transactions by
7 disclosure to the public and their competitors in the marketplace." He further averred that
8 "[n]egotiations for power purchase transactions are multi-faceted, commonly including
9 negotiation of operating conditions, qualifications to satisfy Oregon's Renewable Energy
10 Act, environmental attributes such as renewable energy certificates, mitigation strategies,
11 price calculation and seasonal variations, delivery requirements and other terms and
12 conditions tailored to individual generation projects or EWEB needs," and that, "[i]f
13 power purchase transactions such as the EWEB-Seneca transaction were publicly
14 disclosed it is probable that the generation developers would *raise the price of their*
15 *energy, be less inclined to negotiate certain terms and conditions, or choose not to enter*

⁷ We need not address whether the affidavits establish, as a matter of law, the first requirement of the exemption (that all of the information within the contract is "sensitive business, commercial or financial information"). See *In Defense of Animals v. OHSU*, 199 Or App 160, 172, 112 P3d 336 (2005) (holding that, for purposes of the exemption for "[s]ensitive business records or financial or commercial information of the Oregon Health and Science University that is not customarily provided to business competitors," "the adjective 'sensitive' [means] 'intended to be treated with a high degree of discretion'"). Even assuming that EWEB and Seneca are correct on that point, the affidavits do not compel only one conclusion on the second requirement: that disclosure of all of the information in the contract would cause a competitive disadvantage to EWEB and its customers.

1 *power purchase transactions with EWEB.*" (Emphasis added.) As is the case with Re's
2 affidavit, when Norris's averments are read in the light most favorable to The Register-
3 Guard, a reasonable trier of fact could understand Norris's affidavit to refer to the
4 competitive disadvantage that would result if the contract as a whole or certain specific
5 provisions were to be disclosed, but it says nothing about whether there is any nonexempt
6 material in the contract.

7 Moreover, even assuming that the affidavits must be read as saying that
8 competitive disadvantage would result from disclosure of *any* information within the
9 contract, such broad averments about the effects of disclosure are indirectly controverted
10 by common sense and the other energy contracts that The Register-Guard introduced into
11 the summary judgment record. A trier of fact could reasonably infer that, like other
12 contracts, and like the other energy contracts in the record, the contract between EWEB
13 and Seneca included at least some information--the identity of the signatories and the
14 date of the contract, to name some of that material--that most likely could be disclosed
15 without causing any competitive disadvantage to EWEB or its customers.

16 In sum, we conclude that the summary judgment record does not include
17 enough specificity about the information within the contract itself to compel a factfinder
18 to conclude that the entire contract is exempt from disclosure under ORS 192.502(26).
19 We appreciate that EWEB and Seneca have addressed the contract in generalities in an
20 effort to protect the confidentiality of its contents; and, we further appreciate that *in*
21 *camera* review of a requested document is not, in every case, a prerequisite to holding

1 that the document is exempt from disclosure, *see* ORS 192.490(1) ("The court, on its own
2 motion, *may* view the documents in camera before reaching a decision." (Emphasis
3 added.)). For instance, certain documents--a list of home addresses or Social Security
4 numbers of public employees--might announce their contents in a way that makes *in*
5 *camera* review unnecessary. However, the contract in this case does not itself adequately
6 convey the nature of the information within it, nor do the affidavits sufficiently describe
7 the particular content of the document in a way that would allow a court to apply the
8 exemption as a matter of law. Instead, EWEB's and Seneca's summary judgment motions
9 essentially say, "Trust us, it's exempt." That is not how Oregon's public records law, or
10 the summary judgment process, is intended to operate. *See Kluge*, 172 Or App at 458-59
11 (holding that the trial court "erred in relying solely upon the Bar's description of the
12 contested records in reaching its decision to grant the Bar's summary judgment motion"
13 because "[r]elying solely upon such descriptions eviscerates meaningful judicial review
14 of agency determinations that specific public records are exempt from disclosure"; and
15 that, where *in camera* review had not occurred, "[s]omething more than mere assertions
16 concerning the contents of exempted records is needed in order to protect the public's
17 right of disclosure in this instance" (footnote omitted)). Accordingly, we reverse and
18 remand for further proceedings consistent with our holding.⁸

⁸ EWEB and Seneca offer alternative bases on which to affirm the trial court's ruling, including that the contract is exempt from disclosure under ORS 192.501(2) and ORS 192.502(4). We decline to address those alternative bases on this record, which, as we have explained, does not even include the contract itself. Rather, we remand for the trial court to consider those issues in the first instance, perhaps after an *in camera* review

1

Reversed and remanded.

of the contract itself.