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November 15, 2002

Melissa Jones
The Oregonian, Metro East News Bureau
P.O. Box 1398
Gresham, Oregon 97030

Jim Voykto, Executive Director
Public Employees Retirement System
P.O. Box 23700
Tigard, Oregon 27281-3700

Re: *Petition for Public Records Disclosure Order*:
Public Employees Retirement System Records

Dear Ms. Jones:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on November 7, 2002,[1] asks the Attorney General to direct the Public Employees Retirement System (PERS) to make available "PERS benefit information (such as monthly payments)"[2] for 32 named retirees, listed by school district, during 2001 and 2002. For the reasons that follow, we partially grant and partially deny your petition.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. If a public record contains exempt and nonexempt material, the public body must separate the materials and make the nonexempt material available for examination if it is "reasonably possible" to do so while preserving the confidentiality of the exempt material. *Turner v. Reed*, 22 Or App 177, 186 n 8, 538 P2d 373 (1975).

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[1] We appreciate your extending the time within which the law would have otherwise obligated us to respond.
[2] We interpret the request for "benefit information" to be for financial information about benefits received by each retiree for the two specified years, *i.e.*, either monthly or lump-sum payment amounts.

In responding to your request for records, Jim Voytko, PERS Executive Director, offered to disclose the requested benefit information "in aggregate" for the 32 named retirees. Letter to Melissa Jones dated November 4, 2002. While PERS' response invites you to submit additional information in relation to receiving non-aggregated data, it appears to be a denial of the request to the extent that you wish to receive the information in non-aggregate form. Therefore, we determine whether PERS may withhold the requested records from disclosure.

1. Personal Privacy Exemption

ORS 192.502(2) conditionally exempts private personal information from the disclosure requirements of the Public Records Law. This provision exempts:

> Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof 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[.]

This exemption is not intended for the benefit of the public body. Its purpose is to protect the privacy of individuals from unreasonable invasion. *Jordan v. MVD*, 308 Or 433, 440-42 (1989).

a. Personal Information

The personal privacy exemption applies only to information that is "of a personal nature."[3] The Oregon Supreme Court has interpreted this restriction to mean that the exemption applies to information that is "specific to one individual." *Jordan v. MVD*, 308 Or 433, 441, 781 P2d 1203 (1989). The court referred to the dictionary definition of "personal" in formulating its interpretation: "of or relating to a particular person: affecting one individual or each of many individuals: peculiar or proper to private concerns: not public or general * * *." *Id. quoting* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1686 (Unabridged 1971). The court concluded that a person's home address, age, weight and residential telephone number are "always personal in the sense of being individual information." *Id.*

The petition cites the analysis used by the Oregon Court of Appeals in *City of Portland v. Anderson*, 163 Or App 550, 988 P2d 402 (1999), as a basis for concluding that the requested information is not of a personal nature. The court in *Anderson* described the records being sought about alleged improprieties committed by a member of the Portland Police Bureau as not only relating to a public employee but also having a "bearing on his qualification to serve in a

[3] The petition states that because PERS has "acknowledged the records we seek are public * * * the agency cannot now argue they are also as highly confidential as personal or medical files." This statement misconstrues the Public Records Law. All writings that contain "information relating to the conduct of the public's business * * * prepared, owned, used or retained by a public body" are "public records". ORS 192.410(4). Thus, personnel records and medical records, as well as the records you seek from PERS, are "public" records. The exemptions stated in the Public Records Law enable an agency to withhold from disclosure certain types of information within public records.

position of public trust." *Id.* at 556. The court stated that, while the records at issue "pertain specifically to Garvey, they do not affect him exclusively and are not peculiar to his private concerns." *Id.* On this basis, the court concluded that the records were not of a personal nature.

The fact situation in *Anderson* is very different than that presented by the petition. While we agree that the retirement benefits paid by PERS are of interest to the public, we see nothing in the coupling of the benefits to the identity of specific former employees that bears on issues of public trust. It is clear to us that the benefit amount for named retiree is information that both relates to a particular person and is sufficiently peculiar to private concerns to constitute information "of a personal nature" for purposes of the personal privacy exemption.

b. Disclosure Constituting An Unreasonable Invasion of Privacy

The personal privacy exemption applies in this instance only if disclosure of an individual's PERS retirement benefit information would constitute an "unreasonable invasion of privacy." An invasion of privacy is unreasonable if "an ordinary reasonable person would deem [it] highly offensive." *Jordan*, 308 Or at 442.

Disclosure of data linking named retirees with specific benefits would be an unreasonable invasion of the retirees' privacy. Release of this data could, for example, cause people promoting investment vehicles to make retirees identified as opting for lump-sum payments targets of their efforts. Moreover, disclosure of retirement benefit information would disclose personal information about a retiree of a nature not involved in the disclosure of an employee's salary. While state statutes establish benefit formulas for retirement benefits, and compensation plans for public employees are determined by their employers as part of the public budgeting process, the amount of a particular retiree's benefits is affected by decisions made by that retiree. A prominent example is a retiree's decision whether to receive benefits in a lump-sum, through monthly payments, or in some combination of the two payment methods. Disclosure of this information reveals a personal decision made by a retiree. Finally, elements of Oregon law attest to the fact that "an ordinary reasonable person" would deem disclosure of a former employee's current retirement income "highly offensive." Oregon law protects certain private financial information, specifically that associated with the name of a particular individual, from certain types of disclosure. *See,* ORS 192.550 to 192.595. Breaches of the privacy protection extended by these statutes can give rise to civil liability and to suppression of evidence. ORS 192.559.[4]

What makes disclosure of the requested information an unreasonable invasion of a retiree's privacy is the association of particular retirement benefit amounts with that retiree. In other words, to disclose a particular retiree's benefit information, without disclosing that such information relates to that retiree, would not be an unreasonable invasion of the retiree's privacy. For this reason, we conclude that retirement benefit information for the thirty-two individuals named in the petition, without attribution of such amounts to particular names, employers or

[4] As a basis for concluding that disclosure of the requested information would not be highly offensive you also state that PERS disclosed such records earlier this year. Even assuming that this event occurred, an agency may reconsider its prior decision for a variety of reasons. That a prior disclosure may have occurred is not an element in the statutory exemption and, therefore, is not determinative to our analysis.

other means of identifying the individuals, is not exempt from disclosure under ORS 192.502(2).[5] Therefore, we order PERS to disclose this information.

Because we have concluded above that disclosure of retirement benefit information identifiable to a particular retiree would constitute an unreasonable invasion of privacy, we consider whether the public interest by clear and convincing evidence requires disclosure of that information despite its impact on the individuals in question.

c. Clear and Convincing Evidence that The Public Interest Requires Disclosure

If there is clear and convincing evidence that the public interest requires disclosure in this particular instance, PERS must make the requested records available for inspection. The petition offers several reasons why there is a public interest in disclosure. Primarily, the petition focuses on the financial shortfall that PERS faces, the intensity of current public debate about the system, and, to summarize, the state of flux in which PERS appears to be at the present time. We agree that there is a public interest in the disclosure of information about PERS relating to the issues the petition raises. For example, it may be in the public interest to disclose generalized information about PERS retirement benefits, including typical amounts of such benefits. The question, however, is whether there is clear and compelling evidence that the public interest requires disclosure of specific retirement benefit amounts *identifiable to thirty-two particular retirees*. We do not find clear and compelling evidence to require the disclosure of that data.

The petition identifies thirty-two named retirees with specific school districts. It also states that the Oregonian's readers' "serious and legitimate interest in the compensation of public employees" entitles them to know what the public is spending "to pay retirement benefits to public officials who are still working under public contract." The petition is unclear as to whether all of the named retirees are currently working for the state under public contract. The information that we have ordered PERS to disclose is sufficient to inform the public of the fact, if it is a fact, that individuals currently on contract also receive retirement benefits from PERS. Under our order, the amount of benefit received by each unidentified recipient must be disclosed. However, we find in the petition no overriding public interest requiring disclosure of the requested information paired to a particular individual.

2. Conclusion

To summarize, an individual retiree's benefit information is personal information, the disclosure of which would constitute an unreasonable invasion of privacy if the information is identifiable to the retiree. Disclosure of retirement benefit information for the thirty-two individuals named in the petition, without attribution of such amounts to particular names, employers or other means of identifying the individuals, does not constitute an unreasonable invasion of privacy. However, we do not find clear and convincing evidence among that presented in the petition that the public interest requires disclosure of retirement benefit

[5] Our decision that disclosure does not constitute an unreasonable invasion of privacy is dependent, in part, on the number of individuals for which the disclosure of information is requested. In other words, if a request for disclosure related to information about a more discrete number of individuals it could impact our conclusion about the application of ORS 192.502(2).

information in a way that makes it identifiable to a particular retiree. Therefore, we grant the petition in part and deny the petition in part, as follows.

The petition is granted with respect to, and PERS is ordered to disclose to you, retirement benefit information for the thirty-two individuals named in the petition, without attribution of such amounts to particular names, employers or other means of identifying a particular benefit amount with a particular retiree. We deny the petition to the extent that it is for disclosure of retirement benefit information identifiable to an individual retiree named in the petition.

PERS has seven days from the date of this order in which to comply.[6] ORS 192.450(2).

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

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[6] PERS may charge a fee to reimburse it for its actual cost in making such records available, including for photocopy costs and for time spent by agency personnel reviewing records. *See* ORS 192.440(3).