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March 29, 2004

Jim Redden
Portland Tribune
Senior Staff Writer
620 SW 5th Ave, Ste 400
Portland, OR 97204

Re: *Petition for Public Records Disclosure Order*:
Records of Former Governor Neil Goldschmidt

Dear Mr. Redden:

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 March 22, 2004, asks the Attorney General to order the Oregon Historical Society (OHS) to disclose "certain files compiled during the term of former Oregon Gov. Neil Goldschmidt's administration," which are identified by box number and heading in a postscript to your petition. For the reasons that follow we respectfully deny your petition.

According to your petition, you requested the identified records from OHS Librarian Mary Ann Campbell, who responded to the request by telling you to submit your request to Governor Goldschmidt. Subsequent to Ms. Campbell's response, you requested the State Archivist, Roy Turnbaugh, to order OHS to disclose the records. According to your petition, Mr. Turnbaugh suggested that you seek review of OHS' denial by the Attorney General.

The Public Records Law, ORS 192.410 to 192.505, confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. The Public Records Law defines "public body" to include "every state officer, agency, department, division, bureau, board and commission * * * and any other public agency of this state." ORS 192.410(3). Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney

General to review the public record to determine if it may be withheld from disclosure.[1] ORS 192.450(1).

The Public Records Law does not specify what determines whether a body is public or private. However, in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994), the court analyzed whether a fact-finding team comprised of private citizens but established at the initiative of a school district was subject to the Public Records Law. A review of the text, context and legislative history of the Public Records Law did not disclose whether the legislature intended to apply the Public Records Law to an entity such as the fact-finding team. *Id.* at 456-457 *citing PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-612, 859 P.2d 1143 (1993). Therefore, the court considered "how the legislature would have intended the statute to be applied had it considered the issue." *Id.* at 457 *citing PGE*, 317 Or at 612.

Concluding that "the determination of whether a particular entity is a 'public body' within the meaning of ORS 192.410(3) will depend on the character of that entity and the nature and attributes of that entity's relationship with government and governmental decision-making," *id.* at 463, the court identified and applied a set of factors that bear on that question. *Id.* at 463-464. Therefore, we analyze OHS under the factors cited in *Marks*, which are:

1) The entity's origin (was it created by government or was it created independently?);
2) The nature of the function(s) assigned and performed by the entity (are these functions traditionally performed by government or are they commonly performed by a private entity?);
3) The scope of the authority granted to and exercised by the entity (does it have the authority to make binding decisions or only to make recommendations to a public body?);
4) The nature and level of any governmental financial and non-financial support;
5) The scope of governmental control over the entity; and
6) The status of the entity's officers and employees (are they public employees?).[2]

1. Was OHS created by government? No. According to the *Oregon Historical Quarterly*, OHS was founded in 1873. *OHQ* VOL. 104, NO. 4 at 596. The website for the Office of the Secretary of State, Corporations Division, shows that OHS initially registered as a corporation on December 20, 1898. The legislature did not convene the year prior to incorporation and did not enact any statutes related to OHS during the 1898 special session. An 1899 statute appropriating funds to OHS and providing for a limited

[1] Under the Public Records Law, "state agency" is defined to mean "any state officer, department, board, commission or court created by the Constitution or statutes of this state* * *." ORS 192.410(5).
[2] Factors are taken from the ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2001), 3-4.

amount of work to be done for it by the state printer at the state's expense contains the following description in its preamble:

> Whereas, the Oregon Historical Society has been incorporated and organized under the laws of this state for the purpose of collecting and preserving a library of historical literature relative to the settlement and acquisition of the Oregon territory, and relative to the history of this state, and for the accomplishment of other cognate objects of public interest and,
>
> Whereas, said society has agreed to do all of its work and to hold all of its collections of material for the use and benefit of all the people of this state, and the state is interested in the prosecution and success of its objects, and should contribute aid to the same * * *.

Laws of Oregon 1899 at 224 (SB 17). Based on this information, we conclude that OHS was not created by government.

2. Are OHS' functions traditionally associated with state government? No. According to its website, from the time of its creation OHS has developed and operated a regional research library and a collection of historical artifacts. It publishes the *Oregon Historical Quarterly* as wells as books, field guides and exhibit catalogs, including over 150 books on Oregon history, politics and culture. In addition, OHS also creates and operates education programs focused on Oregon history and other subjects. These activities are not necessarily those traditionally undertaken by state government. While a state may choose to operate historical museums or centers, such as the State Archives, those activities also may be performed by privately-operated entities, such as those run by private colleges and universities. We do not believe that the functions of OHS would be perceived as those traditionally performed by government actors.

3. What is the scope of OHS' authority, *e.g.*, does OHS have authority to make binding decisions for state government? No, OHS does not have authority to make binding decisions for state government. The legislature has directed agencies to consult with and receive the recommendations of OHS in relation to programs touching on matters within OHS' historical expertise. *See, e.g.*, ORS 329.492 (Department of Education to consult with OHS in developing academic content standards in Oregon Studies) and ORS 358.770 (OHS to advise Department of Transportation on acquisition, development and operation of historic places). OHS is also statutorily responsible for preparing, administering and periodically revising a comprehensive program for development of the Oregon Trail as a state historical attraction. ORS 358.045. None of these statutorily-prescribed activities show OHS as having the authority to make binding governmental decisions.

4. Does OHS receive support from state government? Very little. ORS 358.015 provides that the state "recognizes a continuing obligation to contribute to the support of [OHS]," and, in previous biennia, the legislature has appropriated funds to OHS. The Legislative Fiscal Office's analysis of the 2003-2005 budget characterizes the

appropriation as a "supplemental grant," with OHS being financed "largely by membership fees, contributions, and publication sales." LFO Analysis of 2003-05 Legislatively Adopted Budget – Economic and Community Development at 213. However, the legislature appropriated no funds to OHS for the 2003-2005 biennium, a decision that the LFO attributes to budgetary constraints. LFO Analysis at 213.

OHS remains eligible as one of five "core partner agencies" to receive moneys from the Trust for Cultural Development Account. ORS 359.400(2) and 359.426(3)(c). The "core partner agencies" include both entities established by state law, *e.g.*, the Oregon Heritage Commission, and non-state entities, such as the Oregon Council for the Humanities.

5. What is the nature and scope of state control over OHS' operation? The state exercises very little, if any, control over OHS' operations. As already noted, through legislation, the state has directed OHS to prepare, administer and periodically revise a comprehensive program for development of the Oregon Trail as a state historical attraction. ORS 358.045. However, there is no provision for government oversight of how OHS fulfills this task or a mechanism by which government officials may disapprove of OHS' completed work. Except for ex-officio positions, the officers and directors of OHS are not state government officers or employees. Statutes do not control appointments to the OHS Board of Directors nor do statutes provide for those appointments to be made by the Governor or another state government official. Also, in light of the discontinuance of direct appropriations to support OHS, the state does not appear to exert significant influence through the provision of funds.

6. Are OHS' officers and employees state government officials or employees? No. We have not found any evidence that the officers or employees of OHS are state government officials or employees.

Conclusion

Based on the above information, we conclude that OHS does not possess sufficient characteristics to be considered the functional equivalent of a state agency. For this reason, we conclude that OHS is not a public body or the functional equivalent of a public body for purposes of the Public Records Law, and, therefore, we deny your petition.

To the extent that the records deposited with OHS by former Governor Neil Goldschmidt are public records as defined by ORS 192.410(4), their custodian is the State Archivist, the state official who has authority to requisition transfer of the records in the event that they are "stored under conditions where they are no longer available for

use." ORS 357.835(1). A future request for access to former Governor Goldschmidt's records should be submitted to Mr. Turnbaugh.[3]

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS13769

c: Paddy McGuire, Deputy Secretary of State
Roy Turnbaugh, State Archivist
Neil Goldschmidt
Vicki Ballou, Tonkin Torp, Counsel for OHS

[3] You made your request for records of OHS and, in a letter dated March 11, 2004, asked the State Archivist, Roy Turnbaugh, to "require OHS to comply with the law regarding public documents." Because Mr. Turnbaugh was away from the office when we received your petition, we spoke with Paddy McGuire, the Deputy Secretary of State, who is familiar with the actions that Mr. Turnbaugh took in response to your letter. According to Mr. McGuire, the State Archivist understood your March 11 letter to be a request for intervention with OHS, not a public records request directed to him. Mr. McGuire told us that he and Mr. Turnbaugh have contacted OHS about availability of the requested records and are addressing the issue with both OHS and former Governor Goldschmidt.