HARDY MYERS
ATTORNEY GENERAL

PETER D. SHEPHERD
DEPUTY ATTORNEY GENERAL



DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400
TTY: (503) 378-5938

September 3, 2002

SENT VIA FAX (1-503-294-4039) & MAIL

James Long, Reporter
The Oregonian
1320 SW Broadway
Portland, OR 97201
Facsimile: (503) 294-4039

Re: *Petition for Public Records Disclosure Order*:
Oregon Public Broadcasting Records

Dear Mr. Long:

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 August 20, 2002,[1] asks the Attorney General to order Oregon Public Broadcasting (OPB) to disclose "certain financial records." For the reasons that follow we deny your petition.

You asked OPB to disclose to you records that you have identified to Assistant Attorney General Kelly Carlson as its employment contracts with Maynard Orme and Jack Galmiche and contracts between OPB and Mr. Galmiche's business interest, "Big TV," prior to his employment with OPB. You attached to your petition a copy of the response provided by OPB Vice President for Marketing, Laurie Kelley. Ms. Kelley informed you that OPB does not have an employment contract with either Mr. Orme or Mr. Galmich. With respect to your request for other contracts with Mr. Galmiche, Ms. Kelley stated that "OPB is not obligated to disclose confidential private documents as Oregon's Public Records and Meetings Laws do not apply to Oregon Public Broadcasting."

OPB is a private, not-for-profit corporation. It was established as such in 1993 under state legislation abolishing the Oregon Commission on Public Broadcasting and transferring

[1] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

the commission's FCC licenses and other rights and obligations to OPB. *See* Or Laws 1993, ch 208, § 1 (1993 Act).

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. "Public body" includes:

> every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal cooperation, and any board, department, commission, council, or agency thereof; 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. ORS 192.450(1). The Public Records Law defines "state agency" to mean:

> any state officer, department, board, commission or court created by the Constitution or statutes of this state but does not include the Legislative Assembly or its members, committees, officers or employees in so far as they are exempt under Section 9, Article IV of the Oregon Constitution.

ORS 192.410(5).

Your petition asserts that OPB is a public body subject to the Public Records Law under the analysis set forth by the Oregon Supreme Court in *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 878 P2d 417 (1994). In *Marks*, the court held that a private body can be subject to the Public Records Law if it has been created and operates as the functional equivalent of a governmental entity. Citing the characteristics of a public body listed in *Marks*, you argue that OPB is a private body subject to the Public Records Law primarily for the following reasons: (1) OPB operates "under what amounts to a state charter and contract containing some very definite performance requirements"; (2) public broadcasting "traditionally has been a government function," demonstrated by OPB's educational programming and services; (3) OPB is self-governing within the terms of the 1993 legislation, with the Governor appointing a percentage of the corporation's board members and the legislature retaining the authority to "find OPB in default and reclaim the FCC licenses and other property" transferred in 1993; and (4) OPB receives government funding, with the FCC licenses conditionally transferred to OPB by the 1993 legislation having a commercial value of between 50 to 100 million dollars

Although the Public Records Law does not address entities that are the functional equivalent of a public body, we believe that the Attorney General has jurisdiction over petitions seeking the records of entities that are the functional equivalent of a state agency. Therefore, we consider whether OPB is an entity that is the functional equivalent of a state agency. In making this determination, we examine the character of the entity and the nature and attributes of that entity's relationship with government and government decision-making,

see Marks, 319 Or at 463-64, applying the non-exclusive list of factors outlined by the Supreme Court in *Marks*.

1. Was OPB created by the state? Yes. As you describe in your petition, OPB was created by the 1993 Act. While additional steps were necessary, *e.g.*, filing the necessary documents to entitle OPB to hold the status of a private, not-for-profit corporation, enactment of the legislation was fundamental to providing the new corporation with the means to operate as a broadcasting entity.

2. Are OPB's functions traditionally associated with state government? No. The primary work in which OPB engages is the creation and broadcast of television and radio programs. In general, nothing about such work is traditionally associated with government. State government typically is not engaged in the production of radio and television programming.

You point to public broadcasting being under government control in Oregon from 1922 until 1993 as evidence of it being a traditional government function. According to materials provided by OPB attorney Kristin Ingram, public broadcasting was operated first by the Oregon Agricultural College and then by the State System of Higher Education. The Oregon Commission on Public Broadcasting was responsible for operations from 1981 to 1993. However, the legislature chose to break with this tradition in 1993 by placing the authority and responsibility for public broadcasting within the state in the hands of a private not-for-profit entity. Considering this deliberate legislative decision to change the established way of doing things, it would be contrary to logic to look only at the history of public broadcasting within the state to determine whether it is governmental in nature.

According to statistics promulgated by the national Public Broadcasting Service, of the current 171 noncommercial educational licensees, 88 are community organizations, 56 are colleges and universities, 20 are state authorities and 7 are local educational or municipal authorities. Http://www.pbs.or/insidepbs/facts/faq1.html. With community organizations, i.e., not-for-profits, holding over half of the licenses, it does not appear as though operating public television is established as a function performed by government.

Another element that you believe makes OPB's work something traditionally performed by government is its educational focus. But education is a task that persons outside of government undertake, and historically have undertaken. Using television as an example, because OPB is licensed by the FCC as a noncommercial educational broadcaster, it may transmit "educational, cultural and entertainment programs, and programs designed for use by schools and school systems in connection with regular school courses[.]" 47 CFR § 73.621(c). This limitation applies equally to all noncommercial broadcasters, regardless of whether the licensee is a government agency or a not-for-profit foundation, corporation or association. While, consistent with its FCC licenses, OPB provides educational services to the citizens of Oregon, its work in this regard is not parallel to that of educators in the public realm, whose work is overseen and regulated by the state. For example, OPB's programming on television and radio extends far beyond traditional educational material for a classroom setting; according to the materials submitted by Ms. Ingram, the programs that OPB has

shared in responsibility for creating or producing include *Great Lodges*, *Children's Hospital* and *Satellite Sisters*.

On balance, we do not consider OPB's work to be traditionally associated with the work of state government.

3. What is the scope of OPB's authority, *e.g.*, does OPB have authority to make binding decisions for state government? OPB has authority to make binding decisions; however, it has no authority to make decisions on behalf of state government. OPB is a private, not-for-profit corporation. Its business and affairs are managed and controlled by its Board of Directors. OPB Amended Bylaws, Art. II, sec. 7. Its President and Chief Executive Officer is responsible for day-to-day operations. OPB Amended Bylaws, Art. IV, sec. 9. Decisions made by these persons bind OPB. But we have identified no way in which decisions made by OPB personnel bind the actions of state agencies.

4. What is the nature and scope of state control over OPB's operation? The state exercises very little control over OPB's operations. You characterize the 1993 Act as "a conditional grant to OPB of between $50 and $100 million in public assets," and you suggest that "the Legislature could find OPB in default and reclaim the FCC licenses and other property." The following language conditions the transfers of property, rights and obligations to OPB in the 1993 Act:

> To the extent consistent with federal law and regulations and with agreements established by the Oregon Commission on Public Broadcasting, the transfers accomplished by this section are made on the condition that the assets, licenses and right transferred to the private, not-for-profit corporation known as Oregon Public Broadcasting shall continue to be used by the corporation throughout their terms or useful lives, for the purpose of continuing and advancing public broadcasting in Oregon. If the corporation dissolves or discontinues public broadcasting operations in Oregon, the corporation shall *in good faith take all reasonable measures* to transfer or assign the assets, licenses and rights to a public or private entity that has the authority to continue and to advance public broadcasting in Oregon.

Or Laws 1993, ch. 208, §3 (emphasis added). This conditional language is consistent with FCC requirements for holding a noncommercial broadcasting license. In other words, if OPB sought to provide commercial television and radio programming, the FCC would not permit it to continue to hold its licenses. However, even if OPB were to fail to continue and advance public broadcasting in Oregon, no where in the 1993 Act is it stated that the transferred property reverts back to the state. Instead, it provides for OPB "in good faith [to] take all reasonable measures" to transfer the property to an entity that will continue public broadcasting in the state. Therefore, we do not find the conditional language of the 1993 Act to impose ongoing governmental oversight of OPB.

As you note, the 1993 Act does require, as a condition of the law becoming operative, that OPB's bylaws provide for the Governor's authority to appoint "at least 20 percent" of the

directors comprising OPB's board. Or Laws 1993, ch. 208, § 11. OPB's current bylaws contain such a provision. *See* OPB Amended Bylaws, Art. II, sec. 1. According to Ms. Ingram, out of the 24 current members of the board, the Governor appointed four. Once appointed, however, the Governor's appointees are subject to removal for cause or upon recommendation voted upon by a specified percentage of the sitting directors; the bylaws do not provide for their removal by the Governor. *See* OPB Amended Bylaws, Art. II, sec. 6. Because of the Governor's lack of ongoing control over his appointees, and the minority position that they hold on the board in relation to elected directors, we do not find the Governor's appointment authority to constitute a source of substantial state control over OPB's operations.

5. Does OPB receive financial support from state government? Yes. As noted by both you and Ms. Ingram, for the current biennium the Legislature appropriated over $3 million dollars to OPB. In addition, the state is providing OPB with $7 million in proceeds from Lottery Revenue Bonds to finance digital television transmission facilities that Ms. Ingram states are mandated by the federal government.[2]

You state in your petition that "more significant than all these cash grants and appropriations is the Legislature's continuing, conditional 'loan' of the FCC operating licenses to OPB." We see no basis, however, for construing the FCC licenses under which OPB operates as being loaned by the state, subject to recall by the legislature. Those licenses were transferred under the 1993 legislation which, as explained above, contains no provision for them to revert back to the state. Moreover, the licenses are granted and regulated by a federal agency; they are not the state's to control. We find these conclusions consistent with Ms. Ingram's statement that "OPB's licenses are OPB's property and under no law, regulation, lien, contract or 'understanding' does ownership of this property revert to the State." Therefore, without estimating the value of the property and rights transferred to OPB in 1993, we construe such property and rights to have been a one-time transfer instead of a source of ongoing state financial support.

6. Are OPB's officers and employees state government officials or employees? No. The officers and employees of OPB who transferred from the Oregon Commission on Public Broadcasting retained "all rights and privileges of state employees" only through June 30, 1993. Or Laws 1993, ch. 208, §5. Subsequent to the creation of OPB, the Legislature phased out participation by transferred OPB employees in the Oregon Public Employees Retirement System. *See* Or Laws 1995, ch 575, §§ 2, 3. Furthermore, OPB officers and employees do not act in a government capacity, *e.g.*, they do not report to government officials.

Under the factors specifically considered by the court in *Marks*, OPB possesses some characteristics of an entity that is the functional equivalent of a state agency. It was created by government and it receives financial support from the state. However, the lack of governmental control over OPB's operations, the fact that the nature of OPB's broadcasting

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[2] While OPB also receives financial support from the federal government, this fact is not relevant to determining whether OPB is the functional equivalent of a *state* agency for purposes of the Public Records Law.

activities, as well as some of the content, fall outside the realm of functions traditionally performed by government, and the private status of its employees persuade us that OPB is not a functional equivalent of a state agency for purposes of the Public Records Law.

In addition to the factors listed in Marks, we find an, as yet undiscussed, aspect of the 1993 Act relevant to our consideration of OPB's status under the Public Records Law.[3] The 1993 Act provided for the records of the abolished Oregon Commission on Public Broadcasting to be transferred to OPB, to the extent that the records related to the functions being transferred. Or Laws 1993, ch 208, § 9. The provision regarding records ends by stating: "*However*, such records retain their identity as public records subject to ORS 192.410 to 192.505." *Id.* (emphasis added). We find this provision significant. It shows that the Legislature was cognizant of a possible question arising about the status of the transferred records. The only basis for questioning their status would have been OPB's status under the Public Records Law. Instead of making all of OPB's records subject to the Public Records Law, the legislature chose only to continue the public status of the transferred records. Moreover, it did so using language of exception. There would have been no reason for the legislature to have used the word "however" unless it considered making the transferred records subject to the Public Records Law inconsistent with the status of OPB. We find this aspect of the 1993 Act supportive of the conclusion that OPB is not subject to the Public Records Law.

Because we find that OPB is not subject to the Public Records Law, we respectfully deny your petition for disclosure.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS10936
c: Kristin Ingram, Contracts Attorney, OPB (Fax only: 1-503 293-1989)

[3] The factors listed by the court in *Marks* were "not intended to be exclusive." *Marks*, 319 Or at 464 n9. The court clarified that "[a]ny factor bearing on the character of the entity and the entity's relationship with government may be relevant[.]" *Id.*