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

August 12, 2002

Jeb Bladine
President/Publisher
News-Register
PO Box 727
McMinnville, OR 97218

Re: *Petition for Review of Denial of Fee Waiver*:
Public Employees Retirement System

Dear Mr. Bladine:

This letter is the Attorney General's order on your petition for review of the Public Employees Retirement System's (PERS) denial of your request for a waiver of fees under the Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on August 6, 2002, asks the Attorney General (1) to determine if it is illegal for PERS to waive the fees; and (2) to order that the fees be waived. For the reasons that follow, we respectfully deny your petition for a fee waiver.

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. The law also authorizes a public body to establish fees "reasonably calculated to reimburse it for its actual cost in making such records available[.]" ORS 192.440(3). PERS established such a fee schedule in OAR 459-060-0010. ORS 192.440(4) authorizes a public body to waive fees if it determines that waiver is in the public interest "because making the record available primarily benefits the general public." However, even if waiving a fee is in the public interest, "[i]f a public body's sole funding for a particular program is from statutorily or constitutionally dedicated funds, the body may not provide public records at less than its actual costs because to do so would be an illegal diversion of those funds." ATTORNEY GENERAL'S PUBLIC RECORDS AND PUBLIC MEETINGS MANUAL (2001) at 15; 39 Op Atty Gen 61-64 (1978) (waiver of duplication costs under ORS 192.440 would constitute unlawful diversion of constitutionally dedicated highway funds).

In a July 1, 2002, letter, PERS' Executive Director, James Voytko, responded to your request for records by agreeing to provide the information requested to the extent PERS maintains such records and providing you with an estimate that costs "would not exceed $1,000." In a July 31 letter, Mr. Voytko denied your subsequent request for a fee waiver, stating that "[b]ecause the agency's costs are paid from trust moneys, providing public records without cost reimbursement would be a diversion of trust moneys to non-trust purposes."

The Public Employees Retirement Fund (PERF) is held in trust "for the uses and purposes set forth in this chapter [ORS chapter 238] and ORS 237.950 to 237.980, and for no other use or purpose[.]" ORS 238.660(1). PERS' administrative expenses are paid from interest earned by, and credited to, the PERF. ORS 238.610(1); 238.660(1). ORS 238.660(2) places an explicit restriction on expenditures from the PERF:

> Until all liabilities to members and their beneficiaries are satisfied, assets of the fund may not be diverted or otherwise put to any use that is not for the exclusive benefit of members and their beneficiaries.

The Public Employees Retirement Board is the governing body of PERS. The board is required to adopt rules and take all actions necessary to maintain the qualification of PERS and the PERF as a qualified plan and trust under the Internal Revenue Code. *See* ORS 238.630(2)(h). The Internal Revenue Code requires that the assets of a qualified pension trust for employees be used for the exclusive benefit of the employees or their beneficiaries. *See* 26 USC § 401(a).

To waive the fees for providing you the requested records, which Mr. Voytko estimates could cost up to $1,000, would constitute an expenditure of trust assets. Therefore, to comply with ORS 238.660 and the federal provisions governing qualified pension plans, providing you the requested records must constitute a valid trust purpose and be for the exclusive benefit of PERS members and their beneficiaries. Among the reasons that you provide in your petition for seeking disclosure of PERS records, you state that "[w]e may be facing the most dramatic financial crisis ever to confront the combination of city, school, county, special district and state governments in Oregon," and that, "to avoid a financial catastrophe, [Oregonians] must have absolutely accurate information about the PERS system." From the contents of your petition, we cannot conclude that providing you the requested records would be for the exclusive benefit of PERS members and their beneficiaries. Because of the exclusive benefit provisions in state and

federal law, we find that PERS does not have the authority to grant your request for a fee waiver.[1] Since PERS providing you with records at less than its actual costs would constitute an illegal diversion of moneys in the PERF, we deny your petition.

Sincerely,

Peter D. Shepherd

PETER D. SHEPHERD
Deputy Attorney General

AGS10786

[1] Given that PERS is not fully funded at the current time, to determine that PERS lacks the authority to waive the fees related to your records request does not require that we identify situations where liabilities to members and their beneficiaries may be fully satisfied. Likewise, because responding to your request would not be in the exclusive interest of PERS members and their beneficiaries, it is not necessary to determine whether doing so constitutes a purpose set forth in the statutes cited in ORS 238.660(1).