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Jennifer Bils, President
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Re: Petition for Public Records Disclosure Order: ASUO Records

Dear Mr. Ribeiro and Ms. Bils:

This letter is the Attorney General's Order on the petition, by Mr. Ribeiro, for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received January 28, 1992,[1] asks the Attorney General to direct the Executive Office of the Association Students of the University of Oregon (ASUO) to make available to petitioner the following records:

1. All records concerning the hiring of summer comptrollers for the summer of 1991, including names and hire dates, names of person or persons who did the hiring, copies and or dates of advertisements for positions and other relevant documents in connection with the hiring for these positions.

2. Any records pertaining to any ASUO procedures taken in relation to Executive Rules 80.2 and 82.2 for the hiring of summer positions.

3. Copies of all rosters of elected, appointed and hired executive officials who worked during the summer of 1991.

4. Any records of executive action taken to revise the executive pay levels for 1991-92, as revealed in the payroll notebook.

Mr. Ribeiro made the above written request to Ms. Bils, ASUO President, on December 17, 1991. Ms. Bils responded to him on December 20, 1991, providing some of the information requested under "1" above in a narrative form or indicating where some of that information could be obtained, e.g., advertisements for positions can be found in Oregon Daily Emeralds of certain dates. On January 8, 1992, Mr. Ribeiro repeated his request for copies of the actual records requested. For reasons which follow, we grant the petition in part and deny it in part.

Any writing of a public body containing information relating to the conduct of the public's business (a public record) is subject to inspection by anyone unless otherwise expressly provided by Oregon law. ORS 192.420. This office very recently determined that the ASUO Executive Office is a "public body" subject to the Oregon Public Records Law. See Public Records Order, May 23, 1991, Dewing and Stout.

ORS 192.502(7) exempts from statutorily mandated disclosure "any public records or information, the disclosure of which is prohibited by federal law or regulations." Further, ORS 192.496(4) exempts from disclosure "student records

required by state or federal law to be exempt from disclosure." The pertinent federal law is known as the Buckley Amendment to the Freedom of Information Act, 20 USC § 1232g. This office has long been of the view that a federal law or regulation which expresses a clearly prohibitory policy such as the Buckley Amendment, is to be deemed a prohibition even if the means of enforcing the federal policy (loss of federal funds) is only indirectly prohibitory. Attorney General's Public Records and Meetings Manual, at page 36 (1989 ed.).

The Buckley Amendment and its requirements apply to all "educational agencies or institutions" which receive funds under programs administered by the Secretary of Education and, if any part of the educational agency receives such funds, the regulations apply to the recipient as a whole, including all of its parts. 34 CFR § 99.1. Without question, the University of Oregon is an educational agency or institution subject to Buckley. While it is not accurate to describe the ASUO as a department of the University, nevertheless, it is an entity that would not exist but for the presence of the University and it plainly serves University interests. In fact, it is explicitly recognized by the University to be integral to the governance of the University. See, e.g., UO General Bulletin, 1989-90, page 294; and UO Faculty Handbook, page 37 (8th ed., 1989); OAR 571-11-015 (delegation of certain authority to ASUO). We believe this is sufficient to consider the ASUO as being a part of the University for Buckley Amendment purposes.

The Buckley Amendment defines "education records" to mean those records directly related to a student and maintained by an educational institution or by a party acting for the institution. CFR 34 § 99.3 "Education records" (a). Buckley, however, generally excludes from the definition of educational records those employment records relating to persons employed by educational agencies. Id. at (b)(3)(i). But, the law and regulations specifically exempt from the employment records exclusion ". . . records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student." Id. at (b)(3)(ii).

As we previously said: "In other words, if employment records of an educational institution . . . relate to a student's employment in a position that can be filled only by a student, the records may not be disclosed without jeopardizing the availability of federal funds. . . ." Public Records Order, April 13, 1987, Bristol.

We are advised that the Comptroller's position for which the Oregon Commentator seeks information may only be filled by persons who are enrolled with the University at least half-time. Necessarily, given the application of the federal law, this fact has considerable implications for the records requested. We address the availability or nondisclosure of the particular records in the order requested by Mr. Ribeiro in his December 17, 1991, memorandum to Ms. Bils as outlined above.

1. Ms. Bils' December 20, 1991, memorandum to Mr. Ribeiro in large part provided the information requested, but not the records. However, in some instances, no records were requested, e.g., "copies and or dates of advertisements for positions." According to the ASUO, the other existing records which relate to this request are a job description, a list of persons who applied for the summer comptroller position and a form rejection letter.[2] The job description and form letter are public records for which no exemption from disclosure applies. The list of student applicants is, however, a student education record as defined by federal law. Because its disclosure is prohibited under the Buckley Amendment, it is exempted from disclosure under ORS 192.502(7).

2. According to ASUO, the only records existing pertaining to the ASUO procedures taken in relation to Executive Rules 80.2 and 82.2 for hiring summer positions are the ones identified under "1" above and ASUO payroll forms which are executed for individual student employees for the term of their employment or periodically changed if

pay rate or other circumstances require such. These are student education records as defined by federal law. Because their disclosure is prohibited under the Buckley Amendment, they are exempt from disclosure under ORS 192.502(7).

3. Mr. Ribeiro requested copies of all rosters of elected, appointed and hired executive officials who worked during the summer of 1991. Ms. Bils provided the names of such officials in her December 20, 1991, letter, but no records. The only roster which exists concerns positions filled in the spring of 1991. While this is an education record as defined by the Buckley Amendment, that law allows the disclosure of "directory information" including "participation in officially recognized activities" if the educational agency has provided notice of what it considers to be directory information to students and gives them an opportunity to refuse to let even that type of information to be disclosed. See 34 CFR § 99.32 and § 99.37. The University by rule includes "participation in officially recognized activities" as a type of directory information it will disclose unless a student specifically requests it to be suppressed. OAR 571-20-010(g). The roster of ASUO Executive Staff is directory information and, assuming no student requested that his or her name not be disclosed, must be disclosed in its entirety under Oregon's public record law.

4. Finally, records of executive action taken to revise executive pay levels was requested. Here, a little background is useful. As we understand it, the budget process basically determines ASUO executive pay levels. Approved programs are obligated to stay within their total budget, but have discretion to change individual pay amounts so long as the total budget item is not exceeded. The ASUO president has the power to change pay rates within the total budget allocation for the ASUO executive. According to ASUO, the ASUO president has not memorialized any pay changes for the 1991-92 period in writing, and

we are not aware of any requirement to do so. The only records that exist indicating the president's changing executive pay are the individual student employee ASUO payroll forms and monthly payroll memoranda. Again, these are student education records as defined by federal law and are exempt from disclosure under the Oregon Public Records Law.

For the reasons stated above, we deny the request relative to payroll records and grant it relative to the comptroller position statement, roster of ASUO staff, and form rejection letter. The ASUO has seven days from the date of this order in which to comply. See ORS 192.450(2).

Sincerely,

PAMELA L. ABERNETHY
Special Counsel to the
Attorney General

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1. We appreciate Mr. Ribeiro extending the time within which the law would have otherwise obligated us to respond.

2. We are advised that "ASUO Terms of Employment Statements" were not completed for any 1991 summer comptrollers.