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Re: Petition for Public Records Disclosure Order:
University of Oregon Records

This letter is the Attorney General's order on the petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505 that we received on May 15, 2001.[1] The petition asks the Attorney General to order the University of Oregon (University), the State Board of Higher Education and the Department of Higher Education to produce copies of the following records:[2]

- All documents evidencing or relating to any reports concerning inappropriate behavior or possible violations of applicable codes of conduct by University of Oregon women's basketball coach Jody Runge during the academic years 1997-98, 1998-99, 1999-2000 and 2000-01 [conduct records];

- All documents evidencing or relating to University of Oregon women's basketball coach Jody Runge's resignation, including all documents

[1] We appreciate the petitioner extending the time within which the law would have otherwise required us to respond to the petition.
[2] The petition states that it is made on behalf of the petitioner's client, *The Register-Guard*.

evidencing or relating to any settlement agreement between the University and Ms. Runge [resignation records];

- The investigative report prepared by the Kansas City law firm of Bond, Schoeneck & King, LLP, regarding University of Oregon women's basketball coach Jody Runge and the University of Oregon women's basketball program [management report]; and

- All exit interviews conducted with players within the University of Oregon women's basketball program during the academic years 1997-98, 1998-99, 1999-2000 and 2000-01 [exit interviews].

For the reasons that follow, we deny the petition in part and grant the petition in part.

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).

The University's Vice President for Administration, Daniel A. Williams, responded to the requests made by the petitioner's client in a letter dated May 9, 2000. With respect to the four categories of records requested, Mr. Williams responded as follows.

- Conduct records: The University provided a record described in an attachment to the petition as "a five-page spreadsheet summarizing 30 specified violations associated with the women's basketball program."

- Resignation records: The University agreed to provide a copy of Ms. Runge's resignation letter and the final version of the settlement agreement between the University and Ms. Runge.[3]

- Management report: The University denied the request.

- Exit interviews: The University denied the request.

We examine first the University's response to the requests for conduct and resignation records and then examine its denial of the requests for the management report, and finally, the exit interviews.

[3] We understand that the university has disclosed both records to the petitioner's client.

1. Conduct and Resignation Records

Mr. Williams' May 9 letter does not specifically address either conduct or resignation records beyond agreeing to the disclosures cited above. Instead, the final sentence of the response states that "[i]f we identify other documents that are subject to disclosure and that are responsive to your request, we will provide them." Attached to the petition was a May 15 letter to Mr. Williams, which asks the University to clarify the responses in its May 9 letter with regard to both conduct and resignation records. The University responded to that letter through its counsel, Melinda Grier. Ms. Grier wrote to the petitioner, in a letter dated May 18, 2000, that the University's intent was not to deny the requests made by the petitioner's client with regard to either category of records. Ms. Grier's letter states that the University is working to locate and/or review additional records responsive to the requests.

ORS 192.430(1) requires a custodian of public records to provide "proper and reasonable opportunities for inspection and examination of the records in the office of the custodian." The Attorney General may order a state agency to disclose records only when the agency has denied a request for the records. ORS 192.450(1). "The Public Records Law clearly contemplates that agencies have the opportunity to review the requested records and to act on the request before the Attorney General or the courts can review the matter." ***Morse Bros., Inc. v. ODED***, 103 Or App 619, 622, 798 P2d 719 (1990) (citing ORS 192.430(2)). Whether the time that an agency takes to review records and act on a particular request is reasonable will depend on factors such as the volume of the records requested, the staff available to respond to the records request, and the difficulty in determining whether any of the records are exempt from disclosure. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1999) at 7-8 (MANUAL).

The petitioner's client requested conduct and resignation records from the University, respectively, on April 10 and May 1, 2001. The University provided a partial response to these requests on May 9, 2001. Although that response did not specify that the agency was continuing to attempt to locate records responsive to the requests, Ms. Grier's May 18 letter clarifies the University's intent. We have confirmed with Ms. Grier that she is the only University employee reviewing potentially responsive documents to determine their status under the public records law. Ms. Grier, who is a special assistant attorney general acting as the University's in-house counsel, is the only attorney acting in this capacity and has many responsibilities in relation to the University's legal business. In light of this, we do not find the time that the University has taken thus far to respond to the requests to be unreasonable, and we conclude that the University has not denied the request for conduct or resignation records. Therefore, we deny as premature the part of the petition requesting the Attorney General to order disclosure of these categories of records.

2. Management Report and Attached Appendix

The management report is a 32 page document (including cover letter) with several records attached as an appendix. Those records consist of: (i) Ms. Runge's personnel evaluations and correspondence regarding the same from Ms. Runge to the University's director of athletics, Bill Moos, and to Ms. Runge from the senior women's administrator for the University's athletics department, Renee Baumgartner; (ii) a compilation of student-athlete evaluations of the 2000/01 women's basketball program and a comparative chart summarizing four categories of evaluation scoring for men's and women's basketball, soccer, volleyball and wrestling; (iii) a one-page summary of student-athlete exit interviews regarding the 1998/9 women's basketball program; (iv) a typewritten page of notes containing concerns of student athletes; (v) a handwritten page of notes from student-athlete exit interviews; and (vi) a chart setting out the expense budgets of women's sports at the University.

Mr. Williams' May 9 letter denied the request made by the petitioner's client for a copy of the management report, stating that the report is a "personnel record" and also contains "student records." We first examine the extent to which the management report is a personnel record and then consider it as a student record. Finally, we also consider whether the report is exempt from disclosure as an internal advisory communication. ORS 192.502(1).

a. Personnel Records

ORS 351.065 authorizes the State Board of Higher Education to adopt rules and orders by or through each institution under its control restricting access to the institution's personnel records unless the institution executive finds that the public interest in maintaining individual rights to privacy in an adequate educational environment would not suffer by disclosure. ORS 351.065(1),(2). ORS 351.065 further provides:

> (5) Any category of personnel records specifically designated as confidential pursuant to valid rules or orders pursuant to this section shall not be deemed a public record for the purposes of ORS 192.420.
>
> (6) "personnel records" means records containing information kept by the institution, division or department concerning a faculty member and furnished by the faculty member or by others about the faculty member at the member's or at the institution, division or department's request, including, but not limited to, information concerning discipline, membership activity, employment performance or other personal records of individual persons.

The University has promulgated rules under the delegation from the Board of Higher Education provided in OAR 580-022-0060. The University's rules provide that

records containing information concerning an "academic staff member," including information as to professional performance, are "personal records."[4] OAR 571-030-0010(4). The University may not voluntarily release personal records to other than specified University personnel without the faculty member's written consent. OAR 571-030-0025.

Ms. Runge's 1993 notice of appointment provides that she has the rank of "professor" and that her appointment is within the athletics department and the division of administration. The University's rules do not define "academic staff member," but rules promulgated by the Board of Higher Education regarding academic classifications clarify that University personnel appointed with a faculty rank, e.g., professors, are academic staff members. *See* OAR 580-020-0005(1) and (4). Because Ms. Runge was appointed to the academic rank of professor, we conclude that her personal records, as defined by OAR 571-030-0010(4), are confidential personnel records under ORS 351.065(5) that are not a public record for purposes of the Public Records Law. Therefore, to the extent that the management report and its appendix constitute a confidential personnel record, the Attorney General does not have the authority under the Public Records Law to order its disclosure by the University.

In a previous public records order, this office considered the University's redaction of faculty members' names from documents concerning the existence of hazardous materials on University property and concluded that they did not qualify as personnel records under ORS 351.065. In reaching that conclusion, we characterized the types of records that could constitute "personnel records" as follows:

> "[P]ersonnel records" must relate directly to a faculty member's performance as a faculty member so as to implicate his or her continued relationship with the University.

Public Records Order, January 3, 1990, Rydberg at 3. In granting the petition to order disclosure, we explained why the documents in question, although naming faculty members, were not "about" those members so as to qualify as personnel records that the University could classify as confidential.

> The records do not relate to faculty evaluation, and have not been retained in individual faculty members' files. Nor do they appear to have been generated for the purpose of measuring the employment-related performance of specific named faculty members.

Id. We use this same analysis to determine whether the management report or any of the attached records is a confidential personnel record and, therefore, outside the scope of the Public Records Law.

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[4] As relevant to this order, the records that the university's rules label as "personal" come within the definition of "personnel" records in ORS 351.065(6).

Ms. Grier informs us that the University's purpose in seeking the management report was to obtain an independent assessment of problems that had developed within the women's basketball program. While recognizing that an assessment of the program would address its "leadership," Ms. Grier explains that "the University did not seek an independent review for the purpose of determining whether to continue Runge's employment." In addition, Ms. Grier informs us that the University learned of Ms. Runge's interest in the possibility of resigning two days after having received the management report and before any meetings or discussions took place between the athletic department administration and Ms. Runge. Given this sequence of events, Ms. Grier explains that the University neither intended to nor actually used the report to evaluate Ms. Runge's performance.[5]

In light of the University's lack of intent, and actual failure, to use the management report to evaluate Ms. Runge's professional performance, we conclude that the management report as a whole is not a personnel record under ORS 351.065(6) and therefore is not outside the scope of the Public Records Law. From a review of the contents of the management report, however, we have identified a discrete portion within the body of the report and all but two of the records within the appendix as confidential personnel records. A portion of one of the remaining two records within the appendix is also a confidential personnel record.

The management report describes Ms. Runge's annual performance evaluations, while included in the appendix are copies of the actual evaluations and correspondence addressing those evaluations between either Ms. Runge and Mr. Moos or Ms. Runge and Ms. Baumgartner. Ms. Grier has confirmed that the University maintained the performance evaluations and the related correspondence in one of Ms. Runge's evaluative files and that the University's purpose in requiring the evaluations was to assess Ms. Runge's performance as head coach of the women's basketball team. We conclude that the annual performance evaluations appended to the management report, as well as the related correspondence, are confidential personnel records under ORS 351.065(5) and, as such, are outside the scope of the Public Records Law. For this reason, the Attorney General does not have the authority to order the University to disclose those evaluations. We also conclude that, with the exception of the first and last sentences, the portion of the management report appearing on pages 25 and 26 under the heading "Annual Personnel Evaluations" discloses the substance of those evaluations and, therefore, must also be treated as a confidential personnel record under ORS 351.065 to avoid circumvention of the confidentiality provided by that statute.

Also appended to the management report is a compilation of the written evaluations of the women's basketball program completed by the student-athletes for the 2000/01 academic year. Ms. Grier has confirmed that the University maintained the

[5] Under ORS 351.065(3), records that the university uses to evaluate a faculty member must be placed in one of three evaluative files pertaining to that person. Ms. Grier informs us that the university has not placed the management report in one of Ms. Runge's evaluation files.

compilation in one of Ms. Runge's evaluative files, and that it used the evaluations to assess Ms. Runge's professional performance. Therefore, we conclude that the 2000/01 evaluation compilation is part of a confidential personnel record and not a public record subject to disclosure under the Public Records Law. A related record in the appendix of the management report is a chart displaying the average numerical scores from four categories of the 2000/01 student-athlete evaluations for the following sports: men's basketball, women's basketball, soccer, volleyball and wrestling. To the extent that it reveals the scores taken from the 2000/01 student-athlete evaluations, the chart is a confidential personnel record. The remainder of the chart, however, is subject to disclosure under the Public Records Law.

Also included in the appendix of the management report is a one-page typed summary of exit interviews conducted with student-athletes regarding the 1998/9 women's basketball program, a handwritten page of notes that the assistant athletic director for student services, Karen Nelson, took from student-athlete exit interviews (year unknown) and a typewritten page of notes drafted by Ms. Nelson, reflecting concerns of student athletes about the women's basketball program. Ms. Grier has confirmed that the University used all three records to assess Ms. Runge's professional performance. Based on the University's actual use of the records, we conclude that they are confidential personnel records not subject to disclosure under the Public Records Law.

The only document in the appendix that is not at least partially a confidential personnel record is the chart setting out the expense budget of women's sports at the University.

b. Student Records

The University also explained its denial of the request for the management report by stating that it contains student records.[6] Both federal and state laws address the disclosure of records pertaining to University students. The federal Family Educational Rights and Privacy Act (FERPA), 20 USC § 1232g, governs the release of education records for all educational institutions or agencies to which funds have been made available by the Secretary of Education. This includes the University. Under FERPA, an education record is defined as "records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 USC § 1232g(a)(4)(A). The enforcement mechanism in FERPA is monetary – an institution with policies violating FERPA's proscriptions loses federal funds. This office has previously concluded that FERPA prohibits the disclosure of personally identifiable

[6] While Mr. Williams refers to "student records" in his May 9 letter, the relevant statutes and rules use the term "education records." We use the terms interchangeably in this petition.

information from education records without prior consent.[7] 47 Op Atty Gen 1, 35-40 (1993).

State law requires that the Board of Higher Education adopt rules, or delegate the responsibility to adopt rules, relating to student records "consistent with the requirements of applicable state and federal law."[8] ORS 351.070(4)(e). Consistent with FERPA, the University has adopted rules prohibiting the public release of personally identifiable information from student records without the student's written consent. OAR 571-020-0030. University rules define education records as "records which contain information directly related to a student and which are maintained by the University or by a person acting for the University." OAR 571-020-0010(1)(b).

To the extent that the management report contains information directly related to a student, and the information personally identifies that student or makes the student's identity easily traceable, it is exempt from disclosure under the Public Records Law. ORS 192.496(4) (student records required by state or federal law to be exempt from disclosure). Although some records within the appendix to the management report may constitute student records containing personally identifiable information, we concluded above that these same records are confidential personnel records outside the scope of the Public Records Law. Therefore, we assess only the text of the management report itself to determine the extent to which it may constitute a student record that contains personally identifiable information.

In preparing the management report, the Bond firm interviewed student-athletes. The portions of the report that communicate the substance of those interviews are student records. They convey the student-athletes' thoughts and feelings about the women's basketball program and, in this way, are directly related to one or more students. Other portions of the management report are also student records to the extent that they contain information about student-athletes, either drawn from factual materials or from comments made by other interviewees. The report does not identify individual student-athletes by name or other personal identifiers. In three instances, however, we conclude that information provided in the management report in relation to student-athletes would make the identity of one or more of them easily traceable. This information is exempt from disclosure under ORS 192.496(4).

c. Internal Advisory Communications

The Public Records Law exempts from disclosure communications within a public body "of an advisory nature to the extent that they cover other than purely factual

[7] Beyond names, addresses, social security numbers or other personal identifiers such as student numbers, "personally identifiable information" includes a list of personal characteristics or other information that would make the student's identity "easily traceable." 34 CFR § 99.3.

[8] *See* OAR 580-013-0005 for the board's delegation of rulemaking responsibility.

materials and are preliminary to any final agency determination of policy or action." ORS 192.502(1). A public record is exempt from disclosure as an internal advisory communication if:

> (a) it is a communication within a public body or between public bodies;
> (b) it is of an advisory nature preliminary to any final agency action;
> (c) it covers other than purely factual materials; and
> (d) in the particular instance, the public interest in encouraging frank communication clearly outweighs the public interest in disclosure.

MANUAL at 45. While the management report may meet the first three criteria of this exemption, the general content of the report and the events and circumstances surrounding its creation have been so widely publicized that, in this particular instance, the public interest in encouraging frank communication does not clearly outweigh the public interest in disclosure. Therefore, we find that the internal advisory communication exemption does not apply to the management report.

3. Exit Interviews

In his May 9 letter, Mr. Williams explained that in response to the request made by the petitioner's client the University had located exit interviews with student-athletes. Mr. Williams denied the request for those exit interviews stating they were student records. The records at issue are exit interview forms filled out by three student-athletes. Ms. Grier informs us that the University did not use the forms to evaluate Ms. Runge.

We concur with the University's assessment that the forms are student records. However, only that information which personally identifies a student or makes a student's identity easily traceable is exempt from disclosure. With respect to the exit interview forms, the information that personally identifies a student (the date on the form, student's name, address, phone number, major and degree information, and grade point average) may be easily redacted, permitting disclosure of the remaining information.

4. Conclusion

For the reasons stated above, we conclude as follows. First, the portion of the petition that seeks the conduct and resignation records is premature because the University has not denied the request for those records. Therefore, we deny that portion of the petition.

Second, the portion of the management report that discloses the contents of Ms. Runge's personnel evaluations is a confidential personnel record under ORS 351.065(5) and, as such, is not subject to disclosure under the Public Records Law. The information within the body of the management report that would make one or more students personally identifiable is exempt from disclosure as a student record under ORS 192.496(4). Other than the chart setting out the expense budgets of women's sports and

the parts of the 2000/01 comparative chart that do not display the scores from student-athlete evaluations, all of the records comprising the appendix of the report are confidential personnel records under ORS 351.065(5) and therefore not subject to the Public Records Law. With these exceptions, we grant the petition and order disclosure of the management report.

Third, the information within the exit interview forms that personally identifies one or more students is exempt from disclosure as a student record under ORS 192.496(4). Except for this information, we grant the petition and order disclosure of the exit interview forms.

The University has seven days from the date of this order in which to comply. ORS 192.450(2).

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

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