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January 31, 2001

Charles Hinkle
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Re: Petition for Public Records Disclosure Order:
Oregon School Activities Association

Dear Mr. Hinkle:

This letter is the Attorney General's order in response to your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received January 17, 2001,[1] asked the Attorney General to direct the Oregon School Activities Association (OSAA) to disclose records showing the amount of fines for player ejections that were paid by public high schools in the Mt. Hood Conference and Northwest League. For the reasons discussed below, we respectfully deny your petition on the ground that OSAA is not a state agency as that term is defined by the Oregon Public Records Law.

OSAA is a voluntary organization composed of public and private secondary schools. Member schools contractually delegate to OSAA the authority to establish binding rules governing interscholastic athletic competitions. The State Board of Education is required to establish standards for voluntary organizations such as OSAA. ORS 326.051(1)(f). The State Board also has responsibility to review and approve the rules and bylaws of voluntary organizations for compliance for state law and board rules. ORS 339.430(1).

In your petition, you argue that OSAA 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 (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

[1] We appreciate your extending the time in which the law would otherwise have required us to issue the Public Records Order under ORS under ORS 192.450(1).

that: (1) OSAA was largely created by public school districts; (2) OSAA serves a governmental function in its supervision of high school athletics; (3) Public and private schools have granted OSAA independent authority to supervise many aspects of interscholastic athletics; (4) OSAA is predominantly supported by school district funds; (5) OSAA is under the indirect control of its members schools; and (6) OSAA's officers and employees are primarily composed of public school officials. In short, you argue that OSAA is an extension of its public school district members.

The Oregon Public Records Law applies to every public body. "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).

The Attorney General's authority to review petitions and to order disclosure of public records is expressly limited to those public records in the custody of state agencies. 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).

Under these definitions, school districts are public bodies, but they are not state agencies. Petitions for disclosure of records in the custody of a public body other than a state agency may be filed with the district attorney of the county in which the public body is located.[2] ORS 192.460.

Although the statutes do not address entities that are the function equivalent of a public body, we believe that the same allocation of responsibilities between the Attorney General and the district attorneys applies, i.e., the Attorney General has jurisdiction over petitions seeking the records of entities that are the functional equivalent of a state agency and the district attorneys have jurisdiction over records of entities that are the functional equivalent of a public body other than a state agency. Therefore, we consider whether OSAA 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 v. McKenzie High School Fact-Finding Team*, 319 Or at 463-64.

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[2] You have also filed a petition for disclosure of these same records with the District Attorney for Clackamas County where the OSAA's administrative offices are located.

We apply the following non-exclusive list of the factors outlined by the Supreme Court in *Marks*:

1. Was OSAA created by the state or a state agency? No. The OSAA is a voluntary consortium of public and private school districts.

2. Are OSAA's functions traditionally associated with state government? No. The regulation of high school competitions is not an activity traditionally performed by or associated with state government.

3. What is the scope of OSAA's authority, e.g., does OSAA have authority to make binding decisions for state government? OSAA may make binding decisions, but those decisions are not ones that would be made by a state agency because no state agency has responsibility to set rules and policies governing interscholastic competitions. In addition, OSAA has no authority to make decisions that are binding on the State Board or any other agency of state government.

4. Does OSAA receive financial support from state government? No. We are informed that OSAA is financed through dues of its private and public school members, sponsorship payments and gate receipts at competitions. It receives no financial support from state government.

5. What is the nature and scope of state control over OSAA's operation? The only state agency having legal authority over voluntary interscholastic organizations is the State Board of Education. The State Board may set standards for such organizations and is required to review and approve the organizations' bylaws and rules for compliance with state laws and rules of the board. The State Superintendent must rule on appeals by a school district or a voluntary organization that a student is ineligible to participate in interscholastic activities. But the Superintendent's scope of review is limited to whether the decision of ineligibility violates state or federal law or a rule of the State Board. OAR 581-0210035. Aside from these oversight responsibilities, the State Board exercises no supervision or control over the day-to-day operations of OSAA or other voluntary organizations.

6. Are OSAA's officers and employees state government officials? No.

Based on the above factors, we conclude that OSAA is not the functional equivalent of any agency of state government.

We express no opinion as to whether OSAA is an entity that is subject to the requirements of the Public Records Law. To extent it may be argued that OSAA functions as the equivalent of a public body, that body is composed of the OSAA's member school districts and private schools. Because neither school districts nor their functional equivalents are state

agencies, the Attorney General has no authority to consider your petition for disclosure of records in the custody of OSAA. Accordingly, we respectfully deny your petition for disclosure.

Sincerely,

Peter D. Shepherd

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Deputy Attorney General

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