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# DEPARTMENT OF JUSTICE

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January 16, 2001

**Via Mail & Fax (541) 346-6110**
Joel DeVore
Attorney at Law
Luvaas, Cobb, Richards & Fraser, P.C.
777 High Street, Suite 300
Eugene, OR 97401

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

Dear Mr. DeVore:

This letter is the Attorney General's Order under the Oregon Public Records Law, ORS 192.410 to 192.505. Your letter dated December 20, 2000, requests the Attorney General to "review the [University of Oregon's] documents and order that all requested documents be produced." Your letter identifies the following records as not having been received from the University:

> a. We still have not received the requested documents that led up to or relate to the "media policy." We have received no internal memos, no copies of electronic mail, no early draft forms of the policy, and no other documents that caused the policy to come into existence.
>
> You might notice that the University provided only the *revised* "media policy," and did not provide the original "media policy" that was once enclosed with Dave Heeke's letter of August 29, 2000. Al6though we *do* have a copy of the first version of the policy, the fact that the earlier version was not provided to you or us, confirms the absence of surrounding public documents that led up to the creation of the "media policy." Unless it sprang forth whole without any prior discussion, there still are missing public records.

b. As for the temporary rule, we acknowledge receipt by [John Geil's] letter of December 18 of the formal memos, but we still have received no internal memos, no copies of electronic mail, no early draft forms of the rule, and no other documents that caused the policy to come into existence. Among things formal, for example, should be the required statement of "serious prejudice" and "specific reasons."

c. We still have not received a copy of the ESPN Regional/Chambers Communications (KEZI-TV) contract, which was also part of the original public records requests. Thank you for the ESPN Request for Proposal. Of course, it is unsigned and contains blanks. It says that the actual award was to be made no later than June 7, 2000. Chambers (KEZI) has already performed through the football season. Surely, there are additional public records such as a final contract itself, which has not been provided.

Although your December 20th letter was not sent to the Attorney General himself, and, as explained below, was not received by the Attorney General until January 8, 2001, we will treat that letter as a petition for a Public Records Order, requesting the Attorney General to direct the University to produce copies of the records specified above.

**Background**

The University of Oregon, through the State of Oregon, Department of Higher Education, filed a lawsuit in Lane County Circuit Court entitled *State of Oregon, by and Through its Department of Higher Education, the University of Oregon v. Fisher Broadcasting, Inc.*, Case No. 16-00-22175.[1] Pursuant to that litigation, you sent a letter dated November 17, 2000, to Assistant Attorney General John Clinton Geil, one of the attorneys in the Department of Justice Trial Division, requesting assistance in obtaining documents that you identified in the letter as having previously been requested from the University in letters dated September 8 and 21, 2000. Because your November 17th letter did not specifically request that the Attorney General order the University of Oregon to produce the documents or make any reference to the Oregon Public Records Law, AAG Geil understood your November 17th letter to be an informal request for production. AAG Geil immediately responded to you by letter, confirming that he would treat your November 17th letter as an informal request for production of documents within the litigation.

Your letter dated December 20, 2000, was again addressed solely to AAG Geil in the Trial Division of the Oregon Department of Justice. The letter was not received by the Trial Division until December 22, 2000, and was not delivered to AAG Geil, until his return from

[1] On November 8, 2000, your office, representing Fisher Broadcasting, filed a Notice of Removal to Federal Court. A new case number was assigned in the United States District Court for the District of Oregon, Case No. 00-6354-TC.

vacation on January 8, 2001.[2] On January 8, 2001, AAG Geil forwarded your letter to the Attorney General, noting in particular paragraph eight, which requests the Attorney General to order that the requested documents be produced. The Attorney General is treating your December 20th letter as a petition for disclosure of records under the Oregon Public Records Law, which was received by the Attorney General on January 8, 2001.[3]

**Public Records Law**

Turning to the Public Records Law, ORS 192.420 gives every person a right to inspect any public record of a public body "except as otherwise expressly provided by ORS 192.501 to 192.505." The records that you are seeking in your petition may generally be described as: (a) all documents leading up to or relating to the "media policy" promulgated for the year 2000-2001, (b) all documents relating to temporary rule OAR 571-05-0011(10), and (c) the ESPN Regional/Chambers Communications (KEZI-TV) contract.

Melinda Grier, General Counsel for the University, informs us that the University has diligently searched its files and provided to AAG Geil every document that the University has located that come within these descriptions. Ms. Grier states that the University has not been able to locate any other documents relating to the "media policy," and she believes the records provided to AAG Geil are the only records that exist within the University. Ms. Grier informs us that she generated all of the documents related to the temporary rule and is confident that no other documents exist related to that temporary rule. The University is not a party to the ESPN/KEZI contract, and Ms. Grier states that the University does not have a copy of that contract.

In responding to your November 17th letter, AAG Geil provided to you all of the University's documents forwarded to him by Ms Grier other than those that were identified as

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[2] By letter dated December 21, 2000, AAG Geil advised your office that he would be on vacation from December 26, 2000, until January 8, 2001.

[3] ORS 192.470 requires that a petition to the Attorney General requesting the Attorney General to order a public record to be produced be in substantially the form specified in that statute or containing the same information, and be delivered or mailed to the Attorney General's office in Salem. Such a petition should contain, at a minimum, a request that the Attorney General order a state agency to make records available for inspection or to produce copies of records, the name or description of the records, the date(s) on which the records were requested of the agency, and the name of the officer or employee who denied the request for the records. The petition should be mailed or delivered to the Attorney General, Justice Building, 1162 Court Street N.E., Salem, OR 97310. Mailing or delivering a petition to an Assistant Attorney General in the Trial Division of the Department of Justice does not satisfy the statute.

ORS 192.450(1) requires the Attorney General to issue an order denying or granting a petition within seven days from the day the Attorney General receives the petition. Because this petition was received by the Attorney General on January 8, 2001, the Attorney General's order must be issued no later than January 16, 2001. (Seven days from January 8, 2001, is January 15, 2001, which is a legal holiday.)

privileged. Because AAG Geil was treating your November 17th letter as an informal request for production, those documents provided to you were numbered by the Trial Division as Bates numbers 0000001 through 0000095.[4] The documents that were withheld by the Trial Division as privileged communications were Bates numbers 0000096 through 0000113. AAG Geil informs us that the Trial Division is currently in the process of making a privilege log for those documents, pursuant to your recent request. In doing so, AAG Geil, in consultation with Ms. Grier, has concluded that the document identified as Bates number 0000113 should be disclosed to you. AAG Geil will be sending this document to you today.

ORS 192.502(9) exempts from disclosure "[p]ublic records or information, the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law." This exemption covers all records protected by the attorney-client privilege, Oregon Evidence Code Rule 503. We have reviewed those records that were Bates numbered 0000096 to 0000112, and find that each is a confidential communication that was made for the purpose of facilitating the rendition of professional legal services to the client and that each was (1) between the client or the client's representative and the client's lawyer or a representative of the lawyer, (2) between representatives of the client or between the client and a representative of the client, or (3) between lawyers representing the client. *See* OEC Rule 503(2)(a), (d) and (e). Accordingly, we conclude that each of these documents is protected by the attorney-client privilege and exempt from disclosure under ORS 192.502(9).

This office has not identified any existing nonexempt University records within the scope of your December 20th letter that have not been disclosed to you. To the extent that you are seeking records that do not exist, the Attorney General has no authority to order disclosure. As to those records provided to you by AAG Geil, your petition is denied as moot. The remaining records that were Bates numbered 0000096 to 0000112 are attorney-client privileged communications, which are exempt from disclosure under ORS 192.502(9), and as to these records, your petition is denied.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

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[4] We understand that several of these documents had been provided to you previously by Ms. Grier.