JOHN R. KROGER
ATTORNEY GENERAL

MARY H. WILLIAMS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400

October 20, 2009

Daniel C. Re
747 SW Mill View Way
Bend, OR 97702

Paul Cleary
Executive Director
Public Employees Retirement System
PO BOX 23700
Tigard, OR 97281-3700

Re: Petition for Public Records Disclosure Order:
Public Employees Retirement System Records

Dear Mr. Re and Mr. Cleary:

This letter is the Attorney General's order on Mr. Re's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received on October 6, 2009,[1] asks the Attorney General to direct the Public Employees Retirement System (PERS) to produce a copy of the following records:

1. Was former Governor Goldschmidt a member of PERS on July 31, 1989?

2. Is Governor Kulongoski a PERS member and, if he is, does the State of Oregon or another Oregon public employer pick up his PERS employee contribution?

In the emails posing these questions to PERS, Mr. Re indicated that, in asking these questions, Mr. Re was seeking "PERS public records." In a letter dated August 24, 2009, PERS responded that "information as to the status of an individual being a PERS member * * * is exempt from disclosure" under the Public Records Law. Under the circumstances, we liberally construe Mr.

[1] We appreciate Mr. Re allowing us until October 20, 2009 to respond to his petition.

Re's questions as requests for public records that would answer the questions posed by Mr. Re. For the reasons that follow, we partially grant and partially deny Mr. Re's petition.

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). If a state agency denies a request for records, the requester may petition the Attorney General to determine whether the agency's denial comports with the Public Records Law. ORS 192.450. However, the Attorney General's authority does not extend to records withheld on the authority of elected officials. ORS 192.480.[2]

> ORS 192.502(12) unconditionally exempts from disclosure:
> Employee and retiree address, telephone number and other nonfinancial membership records and employee financial records maintained by the Public Employees retirement System pursuant to ORS chapters 238 and 238A.

Under this exemption, all "employee financial records" maintained by PERS are exempt from disclosure. But the structure of ORS 192.502(12) makes it clear that not all employee records maintained by PERS are "employee financial records" within the meaning of the statute. At a minimum, PERS must also have records that are "nonfinancial membership records" for purposes of ORS 192.502(12).

It does not appear to us that all non-financial membership records are covered by the exemption. Instead, the statute provides that "address, telephone number and other nonfinancial membership records" are exempt. The phrase "other nonfinancial membership records" appears at the end of a list. A catch-all phrase at the end of a list is limited by the specific items that precede it. The subsequent catch-all includes only those other items that are similar in kind to the items listed prior to the catch-all. ***Vannatta v. Kiesling***, 324 Or 514, 533, 931 P2d 770 (1997) ("Under the doctrine of *ejusdem generis*, a nonspecific or general phrase that appears at the end of a list of items in a statute is to be read as referring only to other items of the same kind"). *See* ***King Estate Winery, Inc., v. Department of Revenue***, 329 Or 414, 422-23, 988 P2d 369 (1999) (rejecting contention that a non-specific phrase at the end of a list modifies items earlier in the list); ***Quintero v. Board of Parole and Post-Prison Supervision***, 329 Or 319, 324-25, 986 P2d 575 (1999) (general statement preceding a list is not limited by the items following the general statement).

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[2] In your petition, you note that you asked the Governor's office for the information in request number 2 and that your request was denied. However, the Governor's office informs us that it is not asserting the right to withhold PERS records from disclosure. We therefore consider your petition, even insofar as it seeks an order requiring PERS to disclose information that the Governor's office declined to provide.

We need not determine precisely what nonfinancial records fall within the scope of ORS 192.502(12). We are satisfied that the fact of PERS membership is not among those records, for two reasons.

First, in order to disclose membership status on a given date, PERS need only disclose whether an individual's name appears on PERS records surrounding the date in question. We think that, if the legislature intended to include an employee's name within the scope of the ORS 192.502(12) exemption, the legislature would have done so explicitly. The failure to include "name" in a list that includes "address" and "telephone number" seems conspicuous, and we are consequently hesitant to interpret the language appearing after the enumerated list to reach the fact of membership. *See* ORS 174.010.

Second, as a practical matter, the vast majority of PERS members are members automatically by operation of statute. *See* ORS 238.015. We doubt that the legislature intended to exempt from disclosure information that, in the vast majority of cases, would be readily apparent from other sources.

The evolution of ORS 192.502(12) over time is consistent with our understanding. The exemption was initially enacted as 1983 Oregon Laws c. 830 §9. As enacted, it exempted from disclosure "[e]mployee and retiree address, telephone number and other nonfinancial membership records maintained by the Public Employes' Retirement System pursuant to ORS 237.001 to 237.320." Notably, this exemption did not reach financial records, and thus would not have exempted from disclosure information confirming the fact of PERS membership. In 1987, the legislature amended the exemption to add "employe financial records." 1987 Oregon Laws c. 898 § 27. The addition of "financial records" to the existing exemption does not suggest that the legislature intended to exempt information that merely confirms PERS membership, for the simple reason that a member's name is not a "financial record[]."

Another exemption potentially applicable to records maintained by PERS is ORS 192.502(2), the "personal privacy" exemption. It conditionally exempts from disclosure

> Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

We previously concluded, in a Public Records Order dated May 25, 2004, that PERS records pertaining to the amount of money that Governor Goldschmidt annually receives from PERS are exempt from disclosure under this exemption. But in Public Records Order, November 15, 2002, Jones, we ordered PERS to disclose information concerning PERS benefits of 32 named individuals in a way that did not link any particular individual to the details of that individual's

benefits. The effect of such disclosures would be to confirm that each listed individual was a PERS member, as we acknowledged:

> The information that we have ordered PERS to disclose is sufficient to inform the public of the fact, if it is a fact, that individuals currently on contract also receive retirement benefits from PERS.

Public Records Order, November 15, 2002, Jones, at 4.

The quoted language implies that the fact of PERS membership is not exempt from disclosure under the Public Records Law.

Indeed, to conclude that the fact of PERS membership is exempt from disclosure under ORS 192.502(2), we would have to conclude that the information is "personal" and that "an ordinary reasonable person would deem [disclosure] highly offensive." *See* ***Jordan v. Motor Vehicles Division***, 308 Or 433, 442-43, 781 P2d 1203 (1989). The Oregon Supreme Court has interpreted "personal" in this context to broadly reach all information "relating to a particular person." *Id.* at 441 (concluding that certain information is personal because it "is information specific to one individual"). Whether a person is or is not a member of PERS is information that falls within that broad definition of "personal." However, we do not conclude that disclosure of information confirming membership would be "highly offensive" to an "ordinary reasonable person." As we have already mentioned, the fact of PERS membership is automatic and involuntary for the vast majority of PERS members. *See* ORS 238.015. As a result, the fact of PERS membership generally may be inferred from information about a person's employer. Consequently, disclosure of whether a person is a PERS member, without more, cannot be deemed highly offensive to an ordinary reasonable person. To the contrary, that information is readily discernable with respect to most PERS members. We therefore conclude that ORS 192.502(2) does not exempt from disclosure the name included in a nonfinancial membership records maintained by PERS.

Mr. Re's first request asks whether former Governor Goldschmidt was a member of PERS on July 31, 1989. His second request asks whether Governor Kulongoski presently is a member of PERS and, if he is, whether the State of Oregon or another public employer picks up his contribution. Based on the forgoing, PERS is directed to respond to Mr. Re's requests as to whether Governor Goldschmidt was a PERS member on July 31, 1989, and whether Governor Kulongoski is a member now. However, information regarding whether the State of Oregon or another employer picks up any contribution on behalf of Governor Kulongoski would be contained in employee financial records maintained by PERS, and all employee financial records maintained by PERS under ORS chapters 238 and 238A are exempt from disclosure under ORS 192.502(12). Accordingly, we affirm PERS' denial of Mr. Re's request for that information.

Finally, we note that PERS does not maintain records showing whether a member was a member on any particular day, but PERS records do permit an inference as to membership on a

particular day. For example, if PERS' has nonfinancial membership records pertaining to Governor Goldschmidt dated both prior to and after July 31, 1989, those records would permit an inference that Governor Goldschmidt was a member on July 31, 1989. The records themselves, however, may contain additional information that is exempt from disclosure. If that is the case, it is possible the records that may be provided to Mr. Re in response to his request would consist of one or more documents that include the member's name and a date, with other information in the record redacted. PERS may charge for the actual cost of performing such redactions. However, if Mr. Re does not require PERS to provide him with actual records and would be satisfied by a simple "yes or no" answer as to whether PERS records imply membership in PERS on the dates in question, PERS states that it is willing to provide that answer to Mr. Re free of charge. Mr. Re should contact PERS as soon as possible if such a response from PERS will be sufficient. Otherwise, PERS has seven days to comply with this order, and may charge for the reasonable cost of its compliance.

Sincerely,

Mary H. Williams

MARY H. WILLIAMS
Deputy Attorney General

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