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

April 16, 2009

SENT VIA REGULAR MAIL & E-MAIL

William T. Harbaugh
538 PLC
1285 University of Oregon
Eugene, OR 97403-1285
(wtharbaugh@gmail.com)

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

Dear Professor Harbaugh:

On April 2, 2009, you petitioned the Attorney General for a Public Records Order requiring the University of Oregon ("UO") to disclose a number of records.[1] Specifically, your petition seeks (1) unredacted "UO BANNER accounting records for former UO Professor Martin Summers' [Under-represented Minority Recruitment Program ("UMRP")] expenditures"; (2) unredacted "UO BANNER accounting records for UMRP expenditures for all UO employees receiving UMRP money, from 1995 to 2008"; and (3) "The appendix to Ms Grier's response to the [United States Department of Justice ("USDOJ")]." The first numbered item refers to documents that you received from UO, in redacted form, on November 16, 2007. The second numbered item refers to documents that you received from UO, also in redacted form, on March 2, 2009. The third numbered item refers to documents that UO declined to disclose to you, in any form, on June 13, 2008; that decision was upheld by the Attorney General in Public Records Order, September 5, 2008, Harbaugh. For the reasons that follow, your petition is respectfully denied.

BACKGROUND

Oregon's Public Records Law, ORS 192.410 to 192.505, confers upon "any person" the "right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.420(1). "If any public record contains material which is not exempt [from disclosure] as well as material which is exempt from

[1] We thank you for allowing us until April 16, 2009 to respond to the petition.

disclosure, the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination." ORS 192.505.

In this case, the basis for UO's decisions to withhold certain records and redact certain information is ORS 351.065. In part, that statute provides that "[a]ny 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." ORS 351.065(5). Because ORS 192.420 is the statute creating the right to inspect public records, we have concluded that the segregation requirement of ORS 192.505 does not apply to records governed by ORS 351.065(5). Public Records Order, September 5, 2008, Harbaugh at 2.

As to the BANNER records, the question raised by the present petition is whether the information withheld by UO is protected by ORS 351.065. Your petition with respect to the records provided to USDOJ raises the same issue, but presents the prior question whether we should accept your invitation to reconsider our Order of September 5, 2008. We address the three sets of records you are seeking in the order listed above.

DISCUSSION

1. Unredacted BANNER Records Pertaining to Professor Summers

As noted above, UO provided you with redacted versions of BANNER accounting reports pertaining to Professor Summers on November 16, 2007. UO has agreed to provide you with unredacted copies of those spreadsheets. Consequently, we deny your petition with respect to these records as moot.

2. Unredacted BANNER Records for UMRP Expenditures between 1995 and 2008

On March 2, 2009, you received redacted copies of BANNER accounting records pertaining to UMRP expenditures between 1995 and 2008. We have reviewed the redacted information, and the unredacted records for the most recent year provided. UO has indicated that the unredacted records from the most recent year are representative of all of the redactions made by UO, and our review of the redacted records is consistent with UO's indication. See ORS 192.470(2) ("In an appropriate case, with the consent of the Attorney General, the public body may * * * disclose the nature or substance of the public record" in lieu of providing copies to the Attorney General).

The information redacted by UO consists entirely of information that would, either independently or in conjunction with other readily available information, facilitate the identification of the professor whose appointment occasioned a UMRP award. Because your request is specific to UMRP funds, identifying specific professors would further reveal that the professor in question has self-identified as a member of a protected minority class. According to UO rules,

> No faculty member shall be required to give -- although the staff member may voluntarily provide -- information as to race, religion, sex, political affiliation or

> preferences, except as required by valid state or federal laws, rules, regulations, or orders. * * * Except as the faculty member makes the foregoing information available, there shall be no designation in faculty personal records as to the faculty member's race, religion, sex, or political affiliation.

OAR 571-030-0020(2). In other words, the fact that a faculty member is a protected minority is information that appears in UO records only to the extent that it is voluntarily provided to the UO by the faculty member.

The statutory definition of "personnel records" is codified at ORS 351.065(6), which states:

> As used in this section, "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.

As just noted, UO's rules provide that information "as to the faculty member's race, religion, sex, or political affiliation" is only kept if it is submitted by the faculty member voluntarily. We have previously concluded that information regarding minority status is "personal" within the meaning of ORS 351.065, Public Records Order, September 5, 2008, Harbaugh at 5, and we adhere to that determination. It follows that any record by which a professorial candidate self-identifies as a member of a protected class fits within the statutory definition of "personnel record."

UO is not asserting that the BANNER records are, in their entirety, "personnel records." Hence, UO has merely redacted out the information that would facilitate the determination that particular professors have self-identified as minorities. We have previously indicated that a "portion of [a record that is not a personnel record] that discloses the substance of [a personnel record] must also be treated as a confidential personnel record under ORS 351.065 to avoid circumvention of the confidentiality provided by that statute." Public Records Order, May 29, 2001, Lewis & Williams at 6; Public Records Order, June 1, 2001, Hinkle & Williams at 4-5. Because the information redacted by UO would disclose, in significant part, the substance of any records by which the affected professors self-identified as protected minorities, we conclude that the UO is not required to make the unredacted records available. Your petition with respect to these records is respectfully denied.

3. Exhibits Provided to USDOJ on October 25, 2007

Finally, we turn to the exhibits UO provided to USDOJ in response to USDOJ's request for information. As noted above, these records are the subject of a previous Public Records Order concluding that the records are not public records and need not be disclosed in any form. Public Records Order, September 5, 2008. Acknowledging the existence of the previous Order, you ask that the Attorney General reconsider the position that Order takes.

In general, the Public Records Law contemplates that public agencies be given the first opportunity to consider public records requests:

> [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. v. Oregon Department of Economic Development, 103 Or App 619, 622, 798 P2d 719 (1990). Consistent with that principle, we believe that it generally is preferable to address such requests first to the agency itself. Such an approach gives the agency the first opportunity to consider whether its previous decision should be revisited for any reason. Possible reasons include changes in factual circumstances pertinent to an exemption (such as the conclusion of litigation relevant to the ORS 192.501(1) exemption); changes in the agency's view with respect to the need to withhold the document; or an agency's changed understanding of the meaning of an applicable provision of law. All of these are issues that a public agency should generally be allowed to consider in the first instance.

Your petition does not indicate, and we are not aware, that you have recently asked UO to provide you with these records notwithstanding our Order of September 5, 2008. Consequently, we decline your present request that we reconsider that Order.

CONCLUSION

For the reasons described above, your petition is respectfully denied.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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