GA0018-09

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February 6, 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/Oregon University System Records

Dear Professor Harbaugh:

This is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law. The petition was received on Friday, January 30, 2009 via email. The petition relates to requests of the University of Oregon ("UO" or "University"), and the Oregon University System ("OUS"), to disclose certain public records. The email identifies the requested records as

> [D]ocuments related to
>
> 1) the University of Oregon's backdating of its 2008 Affirmative Action plan, and
>
> 2) the use of private email addresses for public business, by members of the Oregon University System Board.

You explain that you requested the UO documents on January 22, 2009, and the OUS documents on January 26, 2009. As of the date of your petition for disclosure of records, you state that no documents had been produced and that OUS had not acknowledged your request.

In your petition, you refer to Oregon law requiring agencies to produce public records within a "reasonable and proper" time. You note that Oregon law does not specify a deadline, though other states do. You state that the median time allowed agencies in other states is five days. Because UO and OUS had exceeded five days at the time you filed your petition, you ask that the Attorney General determine that UO and OUS have constructively denied your request and order those agencies to immediately provide you with the documents in question. We address each petition in the order presented in your email.

I. UO Documents (Affirmative Action Plan)

Your January 22, 2009 request to UO seeks "any one document showing when UO's 2008 Affirmative Action Plan was transmitted to, or signed by, UO President Frohnmayer." The request refers to President Obama's recent call for "government to do its business in the light of day." In that spirit, you ask that President Frohnmayer direct his staff "to produce this document within 5 working days."

UO has provided us with a copy of a February 3, 2009, email responding to your public records request. In that email, UO estimates the actual cost of responding to your request to be Ten Dollars ($10.00), and denies your request for a waiver of the fee. The email states that upon receiving payment of its fee, UO will locate, copy, and provide a record you have requested, subject to applicable exemptions.

In general, Oregon's Public Records Law, ORS 192.410 to ORS 192.505, confers upon "every person" the "right to inspect any record of a public body in this state," subject to certain exemptions and limitations. ORS 192.420(1). A public body is required to "furnish proper and reasonable opportunities for inspection" of public records. ORS 192.430(1). Our office has long interpreted this provision to afford public bodies a "reasonable" time within which to substantively respond to public records requests. *See* ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) ("MANUAL") at 10.

In light of UO's February 3 email offering to provide you with the record upon receipt of its estimated fees, we cannot conclude that UO has actually constructively or denied your request. This email was sent eight working days after you made your request and clearly indicates UO's intention to fulfill your request. For a discussion of public agencies' authority to require prepayment of fees before performing work in response to public records requests, see Public Records Order, Harbaugh, December 11, 2008 at 3; see also MANUAL at 15.

II. OUS Records (Use of Private Email)

You also seek an order compelling OUS to provide you with various "documents related to * * * the use of private email addresses for public business by the Oregon University System Board." You made this request on January 26, 2009 via email to Chancellor George Pernsteiner and OUS Legal Counsel and Secretary to the Board Ryan Hagemann. Once again, you ask that we treat the lapse in time between your request and your petition to our office as a constructive denial of your request. You note that, at the time of your petition, OUS had not sent the acknowledgment required by ORS 192.440(2).

On Monday, February 2, 2009, Mr. Hagemann emailed you on behalf of OUS. Mr. Hagemann's email attached a letter that acknowledged receipt of your request and stated that an estimate of the time and fees for disclosure of the public records would be provided "within a reasonable time." This response is one of the responses specifically permitted by statute, *see* ORS 192.440(2)(d).

According to Mr. Hagemann, OUS believes that it has compiled all or most of the records responsive to your request. Because OUS believes that exemptions are likely applicable, review to determine the applicability of the various exemptions is required. Upon the conclusion of that review, an estimate of any applicable fee will be provided to you; the estimate cannot be

prepared until it is determined whether an attorney may need to redact exempt material for any responsive documents. OUS expects to conclude that review in the near future. Mr. Hagemann reports that he and his staff have been occupied with the February 5 and 6, 2009 meetings of the State Board of Higher Education. See the online meeting announcement, http://www.ous.edu/state_board/meeting/dockets/ddoc090206.pdf.

According to the Oregon Court of Appeals, the Public Records Law contemplates that state agencies should have an opportunity to review documents prior to review by the Attorney General:

> Under the Public Records Law, a person has the right to inspect any records of a public body of this state except records exempt from disclosure. ORS 192.420; ORS 192.501; ORS 192.502; ORS 192.505. Agencies are required to provide "reasonable opportunities for inspection and examination" of the records. ORS 192.430. A person who is denied the right to inspect a public record may petition the Attorney General to review the agency's decision. ORS 192.450. However, [Plaintiff] petitioned the Attorney General for review before the agency had taken action on the request. ***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.*** ORS 192.430(2). [Plaintiff] did not allow the agency that opportunity.

Morse Bros., Inc. v. Oregon Department of Economic Development, 103 Or App 619, 621-622, 798 P2d 719 (1990) (emphasis added).

Under the circumstances of this case, including the relatively short passage of time, the overlap with the scheduled meeting of the State Board of Higher Education, and the fact that your request implicated records that may be privileged (a fact that you recognized by requesting that OUS waive the lawyer-client privilege to the extent applicable), we conclude that you did not allow OUS adequate opportunity to review the records before seeking the Attorney General's review this matter. Consequently, your petition with respect to OUS is denied as premature.

III. Conclusion

For the reasons described above, your petition must be respectfully denied.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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