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December 16, 2008

SENT VIA E-MAIL & REGULAR MAIL

William T. Harbaugh
538 PLC
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(wtharbaugh@gmail.com)

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

Dear Dr. Harbaugh:

This is the Attorney General's order on your petition for review of the denial by the University of Oregon (UO), of your request for a waiver of fees under the Public Records Law, ORS 192.410 to 192.505. Your petition relates to your November 25, 2008 request for public records in the custody of UO. That request sought:

> Request 1: Any public records, including emails or memos, to any UO, OUS, or UO Foundation employees or board members relating to the question of whether or not or under what circumstances, questions from Professor Bill Harbaugh should be answered directly, when they should be forwarded to the UO Counsel's office, and when the UO Counsel's office should be told that Professor Harbaugh has been asking questions. From May 5 2006 to the present.
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> Request 2: Any public records, including emails or memos from any UO, OUS, or UO Foundation employees or board members to Melinda Grier or other General Counsel Attorneys or staff, to Dave Frohnmayer, or to the UO Provost, relating to whether or not or how to respond to questions from Professor Harbaugh. From May 5 2006 to the present.

Your request sought a waiver of fees "on the grounds that [these requests] relate to free speech rights under the first amendment, a topic of longstanding public interest."

The UO initially responded to this request on December 1, 2008, indicating that a fee estimate would follow. On December 9, 2007, UO estimated its fees for the second numbered request at "Two-Hundred Eighty-Five Dollars ($285.00)" and indicated that "[t]o the extent you have requested a waiver of this fee, the request is respectfully denied." Later on that day, you filed your petition with our office. Your petition asks that we "order [UO] to waive this fee and produce [responsive] documents in unredacted form without further delay."[1] Your petition also states that you are "writing an invited Op-Ed for a major Oregon paper on the topic of UO's faculty governance problems and administrative abuses" and that "[t]hese records are critical to that story." For the reasons that follow, we are compelled to respectfully deny your petition.

We begin with the request that we order UO to disclose the documents "in unredacted form." At this stage, we cannot be certain that redactions will be made by UO. Based on the nature of the records you requested, it seems likely that the Public Records Law would allow UO to redact information from responsive records. Specifically, we think it quite possible that at least some responsive records will contain material that is protected by the lawyer-client privilege, ORS 40.225, and thus exempt under ORS 192.502(9). But in any event, we are without power to direct UO to forego redactions that the Public Records Law would permit. And without specific redactions before us, we are in no position to exercise the authority we do possess, which is to evaluate the lawfulness of any redactions.

Your petition complains about the "Kafkaesque absurdities of [UO's] position," based in part on your expectation that the redactions will remove the explanation of "why [UO General Counsel Melinda Grier] ordered people not to answer my questions." Assuming that the response will, indeed, contain redactions, we do not see the absurdity. In view of the disclosure exemption for privileged materials, see ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) (MANUAL) at 86-87, it seems to us that you invite a redacted response when you request documents concerning purported advice from UO's General Counsel. It is, of course, possible for UO to waive the lawyer-client privilege. But we have no authority to direct UO to do so, or to disclose documents that the Public Records Law would otherwise permit UO to withhold.

We move next to your request that we order UO to disclose the documents "without further delay." To the extent that you are asking us to treat your request for records as constructively denied, we decline to do so. In a recent Public Records Order addressed to you, we explained the relevant factors for assessing whether a public body has exceeded a reasonable time in responding to a request for records. Public Records Order, Harbaugh, December 11, 2008. Because it is not clear that your petition is truly seeking an order on this basis, we will not address the issue in great detail. We note, however, that your November 25, 2008 requests are open-ended requests that require UO to review a significant volume of records to determine

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[1] Your petition suggests to us that there may be some confusion regarding the scope of the estimate provided by UO. According to UO's email containing the estimate, the fees estimated relate only to documents "from any UO, OUS, or UO Foundation employees or board members to Melinda Grier or other General Counsel Attorneys or staff, to Dave Frohnmayer, or to the UO Provost, relating to whether or not or how to respond to questions from Professor Harbaugh." Your petition is not so narrow, however, and this Order understands your petition to encompass both of the component requests of your November 25, 2008 email.

whether they are responsive. Also (as noted above) the subject matter of your request is such that reviewing the documents to determine whether portions are privileged or otherwise exempt is clearly appropriate. In sum, the balance of relevant factors would not support an order finding that UO has constructively denied your November 25, 2008 request for records.

We turn finally to your request that we order UO to waive its estimated fees in view of the public interest in disclosure. A public body may waive its fees under the Public Records Law if the public body determines that waiver serves the public interest "because making the record available primarily benefits the general public." ORS 192.440(5). However, even if a public body determines that waiving fees is in the public interest, "the decision to waive or reduce fees is discretionary with the public body, although it must act reasonably." MANUAL at 21. As such, there are two issues posed by your request for an order directing UO to waive its fees. First, does "making the record available primarily benefit[] the general public"? Second, if a waiver would serve the public interest, has UO nonetheless acted reasonably in denying your request for a waiver?

The Oregon Court of Appeals has construed the public interest requirement for granting a fee waiver or reduction. ***In Defense of Animals***, 199 Or App 160, 188, 112 P3d 336 (2005). The court concluded that "[a] matter or action is commonly understood to be 'in the public interest' when it affects the community or society as a whole, in contrast to a concern or interest of a private individual or entity." In addition, the court stated that "a matter or action 'primarily benefits the public,' * * * when its most important or significant utility or advantage accrues to the public." *Id.* at 189.

You offer two explanations arguing that a fee waiver would serve the public interest. First, you asserted to UO that your requests "relate to free speech rights under the first amendment, a topic of longstanding public interest." Second, your petition states that the records "are critical to" "an invited Op-Ed for a major Oregon paper on the topic of UO's faculty governance problems and administrative abuses" that you are writing.

We assume, without deciding, that disclosure to you would adequately serve the public interest. Your history of publication establishes that you have the ability to disclose information to the public, and the assertion that you are writing an invited op-ed suggests that the materials may be relevant to a matter of public interest. Nevertheless, we conclude that UO has acted reasonably in denying your request for a waiver.

The MANUAL identifies a number of factors that are relevant in determining whether a public body acts reasonably when it denies a request for a fee waiver that would be allowable under ORS 192.440(5):

> Any financial hardship on the public body, the extent of time and expense and interference with the business of the public body, the volume of the records requested, the necessity to segregate exempt from nonexempt materials, and the extent to which an inspection of the records is insufficient for the public interest or for the particular needs of the requestor.

MANUAL at 21. In previous Public Records Orders addressed to you, we have indicated that UO may properly consider the cumulative burden imposed by your public records requests when considering whether to waive fees associated with your requests. Public Records Order, August 29, 2007, Harbaugh; Public Records Order, September 5, 2006, Harbaugh. We have some direct awareness of the number of public records requests that you make of UO, as you often copy DOJ attorneys on those requests, and a number of your requests ultimately become petitions to the Attorney General. UO indicates that you have presented more than a dozen records requests and questions to UO since September 26, 2008. These requests cause a significant diversion of UO financial resources from UO's other statutory tasks. The volume of your requests also diverts staff time and thus causes "interference with the business" of UO. The likely necessity of segregating exempt from non-exempt records is another factor weighing clearly in favor of the reasonableness of UO's determination.

The volume of records you have requested is not immediately apparent; in the end it is possible that the number of responsive documents will be fairly small. However, we note that UO must locate those responsive documents from a large universe of potentially responsive documents. Seen in that light, this factor also supports the reasonableness of UO's decision.

In sum, the bulk of the relevant factors identified in the MANUAL indicate that the UO has reasonably denied your request for a fee waiver.

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

Sincerely,

for PETER D. SHEPHERD
Deputy Attorney General

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c: Ryan Hagemann, Oregon University System
Doug Park, University of Oregon