HARDY MYERS
ATTORNEY GENERAL

PETER D. SHEPHERD
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400
TTY: (503) 378-5938

December 11, 2008

SENT VIA E-MAIL AND REGULAR MAIL

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

Re: Petition for Public Records Disclosure Order:
University of Oregon Records ("UO")

Dear Dr. Harbaugh:

On December 4, 2008, we received two emails from you concerning requests you have made for records in the custody of the University of Oregon (UO).

The first email, time-stamped at 2:08 A.M., refers to "a simple request for a few employment contracts." Attached to the email is a previous email addressed to the UO General Counsel's office in which you sought "the contracts of University administrators with a rank of Vice Provost, Vice President or above for the fiscal years 2007 and 2008." Your email to UO also makes a separate request, but your email to our office does not mention that request. Your email to our office asks that we

> stop the practice of allowing state agencies to use these lengthy delays, and instead adopt an interpretation of "proper and reasonable" that is consistent with what most other states allow: 5 working days.

Although you do not specifically state that you are petitioning for a Public Records Order under ORS 192.450, the context makes it plain to us that you are seeking such an Order. You state that you requested the documents in question almost six weeks prior to your petition, and promptly paid the estimated fee of $50.00 upon receiving the estimate. The attached email indicates that your underlying records request was filed on October 27, 2008, which is consistent with your

description of the timing. Throughout this Order, we will refer to the request underlying this petition as "Request 1."

The second email is time-stamped at 6:52 A.M. It relates to your November 14, 2008 request "for copies of any public records relating to advice from the UO General Counsel's office that UO employees not answer questions from Bill Harbaugh." You state that a fee estimate was provided to you nearly two weeks later, and promptly paid. UO documented that it provided you with an estimate on November 25, 2008, and UO told us that it received your payment on December 2, 2008. The request underlying this petition will be referred to as "Request 2."[1]

Because these petitions were received on the same day and involve similar issues, we address them together in this Public Records Order.

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 MANUAL (2008) (MANUAL) at 10. In a petition addressed to you earlier this year, we explained that the recently-enacted requirement that public bodies acknowledge receipt of public records requests "as soon as practicable and without unreasonable delay," ORS 192.440(2), did not change the fact that an agency still has a reasonable time within which it must ultimately provide access to its records. Public Records Order, October 27, 2008, Harbaugh; *see also* MANUAL at 10. Thus the question presented by both of your petitions is whether UO has exceeded a reasonable time in responding to either of the requests that are the subject of this Order. For the reasons explained below, we conclude that UO has not constructively denied your requests for records.

Both of your petitions assert that laws governing access to public records in other states give public bodies an average of five working days to provide records in response to public records requests. As noted above, your petition with respect to Request 1 specifically asks that we adopt a similar interpretation of what is "reasonable" under Oregon law. We decline to do so. In general, the word "reasonable" is used in the law to indicate that various considerations may go into a particular act or decision and the relative weight assigned to the pertinent considerations can permissibly vary. Perhaps more simply, the word describes a spectrum of allowable results; we do not think it would be proper to interpret the statutory term "reasonable" to establish a hard and fast deadline of the kind you propose. Moreover, the 2007 amendments to the Public Records Law obligating public bodies to acknowledge receipt of written public records requests conform to the Attorney General's longstanding interpretation; one of the responses a public body is statutorily authorized to give is that "the public body is the custodian of at least some of the requested public records and that ***an estimate of the time and fees for***

[1] On December 9, 2008, we received a petition from you concerning another request for UO records that appears closely related to the request underlying this particular petition; however, the request underlying your December 9 petition notes that it is separate from your November 14, 2008 request.

disclosure of the public records ***will be provided by the public body within a reasonable time.***" ORS 192.440(2)(d), enacted as 2007 Or Laws ch 467 § 1 (emphasis added). This statutory provision clearly contemplates that a "reasonable" period of time may elapse during the preparation of the "estimate of the time and fees for disclosure," and that disclosure itself may then proceed according to the estimated timeframe. This is consistent with the flexible requirement of reasonableness we have consistently described for the timing of public bodies' responses to requests under Oregon's Public Records Law. Regardless of what you claim about the laws of other states, the Attorney General's responsibility is to interpret and apply the law of Oregon.

The MANUAL lists a number of factors that are relevant to determining whether the response time of a public body is reasonable:

> The amount of time that is reasonable will depend upon the volume of records requested, the staff available to respond to the records request and the difficulty in determining whether any of the records are exempt from disclosure. * * * The public body may consult with its legal counsel to determine whether records are exempt from disclosure and to receive advice on other questions relating to the Public Records Law.

MANUAL at 10-11. In at least one previous Public Records Order addressed to you, we explained that staff availability is evaluated in light of the other duties of staff members, as well as absences such as those caused by illness. Public Records Order, November 5, 2008, Harbaugh. And we believe that the difficulty of determining whether responsive documents exist and identifying those documents is highly relevant, without regard to the volume of records requested. If a request essentially asks a public body to determine whether a needle is hiding in a haystack, a relatively lengthy response time is probably inevitable. For each of the two petitions resolved by this Order, we must weigh those factors and determine whether, on balance, UO has exceeded a reasonable time to respond.

We begin with your petition concerning Request 1. We note that your request was, as you state, filed nearly six weeks before your petition to this office. However, UO argues that the date on which it received prepayment of its fees is the proper starting point for measuring whether it has exceeded a reasonable time. In these circumstances, and as a general matter, the law supports UO's position. "A public body may require prepayment of its estimated charges before taking further action on the request." MANUAL at 15. If the fee estimate itself is not timely delivered, however, we do not believe that a public body should be given the benefit of any resulting delay. In this case, UO has told us that it sent an initial acknowledgment of Request 1 on October 30, 2008. That is three days after the request was made. UO further informs us that it provided you with a formal estimate of its fees on November 4, 2008, three working days after the acknowledgment. In our view, this timing demonstrates UO's compliance with the requirements of ORS 192.440(2). As a result, and because agencies may decline to act on records requests until they receive payment of their estimated fees, UO is entitled to have the reasonableness of its response time judged from the date on which it received payment of its estimated fees.

UO indicates that it received your payment for Request 1 "late in the day" on November 24, 2008. Your petition was filed with our office on the morning of December 4, 2008. Even counting the Friday after Thanksgiving, only six working days intervened between UO's receipt of your payment for Request 1 and your petition to our office. Your petition is premature in light of the few working days between UO's receipt of payment for Request 1 and the date of your petition to our office. As previously mentioned, the reasonableness of UO's response time is determined by considering the totality of circumstances, including the total volume and complexity of public records requests to which UO is devoting resources.

We turn to your petition with respect to Request 2. With respect to this request, the balance of relevant factors tips decidedly in favor of finding that UO has not exceeded a reasonable time in responding to your request. First, this request does not seek a discrete number of documents, but instead asks for "*any* public records *relating to* advice from the UO General Counsel's office that UO employees not answer questions from Bill Harbaugh" (emphasis added). This is an open-ended request potentially implicating numerous documents. It also requires the General Counsel's office to review its communications thoroughly to determine which ones may be responsive; as discussed above, responding to such requests is likely to take a fair amount of time. Moreover, because the requested records specifically "relat[e] to advice from the UO General Counsel's office," it is obviously proper to review the documents to determine whether they may be privileged. The remaining factors discussed above, including reduced staff availability in light of the Thanksgiving holiday and the other duties of staff, also weigh in favor of finding that UO has not exceeded a reasonable time for responding to Request 2. In light of all these factors, we believe that your petition with respect to Request 2 is premature.

For the reasons described above, your petition is respectfully denied as premature with respect to both of your underlying requests for public records.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

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c: Ryan Hagemann, UO Counsel