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October 27, 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:
Oregon University System Records ("OUS")

Dear Mr. Harbaugh:

This letter is the Attorney General's order on your petition for the disclosure of records in the custody of the Oregon University System (OUS) under the Oregon Public Records Law, ORS 192.410 to 192.505. We received your petition on October 20, 2008. Your initial petition asks the Attorney General to treat the failure of OUS to acknowledge your October 7, 2008 request for records as a constructive denial of the request and to order OUS to provide the documents in question. The underlying request seeks "any employment or post-employment contracts for UO President David Frohnmayer made from October 1, 2006 to the present." The request also defines what you mean by the terms "employment contract," and "post-employment contract."

On the day we received your petition, Ryan Hagemann, acting as the Secretary of the State Board of Higher Education, acknowledged your request for records. Mr. Hagemann's acknowledgement states that OUS is the custodian of at least some of the requested public records, and that OUS will provide an estimate of the time and fees for disclosure of the public records within a reasonable time. Mr. Hagemann's response contains the information contemplated by ORS 192.440(2)(d).

Nevertheless, on October 21, 2008, you sent an email to Assistant Attorney General Christine Chute declining to withdraw your petition. We now respectfully deny that petition, for reasons that follow.

In your October 21, 2008 email, you explain why you decided not to withdraw your petition:

> I do not think it's proper or reasonable for Mr. Hagemann to delay this long. It has now taken more than 2 weeks just for him to acknowledge that the OUS does in fact have a copy of President Frohnmayer's employment contract. This fact was obvious.

We agree with you that OUS has copies of at least some of the documents you requested, and that fact would seem obvious from the nature of your request. We note, however, that Mr. Hagemann's acknowledgment did not take more than two weeks. In addition, Mr. Hagemann's response appeals to your patience, explains Mr. Hagemann's recent illness and corresponding need to catch up on various projects, and promises that Mr. Hagemann will "do [his] best to expedite your request, in light of other duties and obligations."

Ultimately, we need not decide whether Mr. Hagemann's response on behalf of OUS was made "as soon as practicable and without unreasonable delay," the requirement imposed by ORS 192.440(2). The Attorney General has the authority to consider petitions from "any person denied the right to inspect or to receive a copy of a state agency." ORS 192.450(1). Even if we could find that OUS did not comply with ORS 192.440(2), we would still need to find that the failure constituted a denial of your right to inspect or receive copies of public records. Tacitly recognizing that limitation on our authority, your initial petition asks that we construe the lack of response up to that point "as a denial."

We cannot do as you request. To do so would require us to conflate the initial response required by ORS 192.440(2) with the amount of time within which agencies must ultimately and substantively respond to public records requests. Despite the new requirement that agencies promptly acknowledge written records requests, we think that an agency still has a reasonable time to respond substantively to public records requests. *See* ATTORNEY GENERAL'S PUBLIC RECORDS MANUAL (2008) ("MANUAL") at 10.

In this case, OUS has now acknowledged your public records request and given you an explanation of the circumstances surrounding the delay in that response. We do not decide whether the acknowledgment sent to you thirteen days after your initial request for records was timely under ORS 192.440(2), because, in any event, the delay of less than two weeks would not support an inference that OUS constructively denied the substance of your request.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

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c: Ryan Hagemann