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September 29, 2008

Dwain Clifford
Ball Janik LLP
One Main Place
101 Southwest Main Street, Suite 1100
Portland, OR 97204-3219

Re: Petition for Public Records Disclosure Order:
Public Employees Retirement System

Dear Mr. Clifford:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. We received your petition on September 22, 2008. For the reasons that follow, we respectfully deny your petition.

In your petition, you state that you "asked to inspect and/or copy" a particular record, namely:

> The settlement agreement between the plaintiff and Merck & Co., Inc. in the lawsuit captioned *The State of Oregon, by and through the Oregon State Treasurer on behalf of the Oregon Public Employee Retirement Fund v. Merck & Co., Inc.*, Multnomah County Circuit Court Case No. 0508-08455.

You state that you made this request by letter to Alan Smith of the Oregon Public Employees Retirement System (PERS).

Mr. Smith is the designated recipient for requests seeking access to the public records of PERS. See http://oregon.gov/PERS/docs/procedure_for_public_record_requests.pdf (visited September 26, 2008). On behalf of PERS, Mr. Smith denied your request, indicating that "[a] review of our records was conducted and PERS does not possess the requested records. It was also determined that PERS would not be the custodian of the requested record." On the basis of that statement, your petition asks the Attorney General "to order [t]he State of Oregon, by and through the Oregon State Treasurer on behalf of the Oregon Public Employee Retirement Fund (or, as appropriate, the state agency or public body identified in the caption of the attached lawsuit)" to produce a copy of the record described above.

We note first that your petition does not appear to seek an order directed to PERS. Instead, you seek an order directed to "[t]he State of Oregon, by and through the Oregon State Treasurer on behalf of the Oregon Public Employee Retirement Fund (or, as appropriate, the state agency or public body identified in the caption of the attached lawsuit)." But your petition and supporting materials indicate only that PERS has denied your request for this record. You do not suggest, and we are not aware, that any other state agency has denied a request to make this record available to you.

In general, ORS 192.450(1) provides a person "denied the right to inspect or to receive a copy of any record of state agency" with the right to seek an order from the Attorney General directing that agency to release the public record. If an agency has not denied your request to inspect or copy its records, the Attorney General is without statutory authority to order disclosure by that agency. Therefore, to the extent that your petition seeks an order of the Attorney General directed to any agency other than PERS, your petition is respectfully denied as premature.

To the extent your petition seeks an order directed to PERS, the petition still must be denied. Mr. Smith's letter denying your request to inspect or copy the record stated that PERS does not possess the record you seek and is not a custodian of the record. The Public Records Law requires custodians of public records to make those records available for inspection or copying, unless the records are statutorily exempt from disclosure. ORS 192.430(1). A custodian is "a public body mandated, directly or indirectly, to create, maintain, care for or control a public record." ORS 192.410(1).

We agree with Mr. Smith that PERS is not a custodian of the record you requested. The duties of PERS vis-à-vis the Public Employees Retirement Fund are set forth at chapters 237, 238 and 238A of the Oregon Revised Statutes. We see no specific statutory duties that would currently require PERS to "create, maintain, care for or control" a copy of the record you seek. Nor are we aware of any general duties that would make PERS a custodian of the settlement agreement in question. As the caption of the case to which your request relates indicates, the Oregon State Treasury – not PERS – brought the action.

After receiving your petition we became aware that you have submitted a request for the record to the Oregon State Treasury. That agency is evaluating the request. We cannot order the Oregon State Treasury to make available the requested record until and unless it denies the request in whole or in part.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

DM1044795
c: Alan Smith, PERS Records Officer
Kate Richardson, Oregon State Treasury