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September 5, 2008

SENT VIA E-MAIL & REGULAR MAIL

Dr. William T. Harbaugh
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Re: August 22, 2008 Petition for Public Records Order:
University of Oregon Records (Documents provided to U.S. Dep't of Justice)

Dear Dr. Harbaugh:

On August 22, 2008 we received your petition for a Public Records Order compelling the University of Oregon (UO) to either provide you with documents that it withheld in responding to a certain public records request, or else to redact the records to conform to the applicable requirements of the Public Records Law.[1] The documents in question were withheld by the UO in response to your request for all of the documents provided by Melinda Grier, UO General Counsel, to the United States Department of Justice (USDOJ) in connection with USDOJ's now-closed investigation into UO's Under-represented Minority Recruitment Program (UMRP).

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. ORS 192.420. Any person denied the right to inspect or receive a copy of a public record of a state agency may petition the Attorney General to determine whether the record may be withheld. ORS 192.450(1). And "[i]f any public record contains material which is not exempt [from disclosure] as well as material which is exempt from disclosure, the public body shall separate the exempt and nonexempt material

[1] Thank you for allowing us until September 5, 2008 to respond to your petition.

and make the nonexempt material available for examination." ORS 192.505.[2] However, UO has not indicated that the materials withheld, or any portion of those materials, is exempt by virtue of the Public Records Law. Instead, UO claims that the materials withheld are not public records at all, by operation of ORS 351.065(5).

That statute provides that "Any category of personnel records specifically designated as confidential pursuant to valid rules or orders pursuant to [ORS 351.065] shall not be deemed a public record for the purposes of ORS 192.420." By its terms, the separation requirement of ORS 192.505 applies to "any public record," and ORS 351.065(5) explicitly provides that affected materials are *not* public records. Because it believes that this statute is applicable, UO contends that it is not required to make redacted copies of the record available. To evaluate UO's contention, we must determine whether the materials withheld have been "specifically designated as confidential" under University rules. For reasons that follow, we conclude that the materials are so designated, and therefore are not "public records" by operation of ORS 351.065(5). We consequently deny your petition.

I. UO's rules

UO's rules establish four categories of personnel records. OAR 571-030-0010 provides the following definitions:

> (1) "Directory Information" is that information generally needed in locating a particular academic staff member, including information found in the **University Catalog, Time Schedule of Classes**, and **Telephone Directory.**
>
> (2) "Records of Academic Achievement" are limited to the information as to the number of credits earned toward a degree or in post-doctoral work, and certificate(s), diploma(s), license(s), and degree(s) received.
>
> (3) "Salary Information" shall include the rate of pay and terms and conditions of employment.
>
> (4) "Personal Records" are all other records containing information concerning an academic staff member, apart from those identified above.
>
> Personal records include but are not limited to: Information kept by the University, college, or school, department or division concerning a specifically identifiable faculty member and furnished by the staff member or by others at the University's, college's or school's, department's or division's, or at the staff member's request. Personal records include but are not limited to: information as

[2] In your petition, you indicate that Public Records Order, January 16, 2008, Harbaugh and Hagemann, addresses specific requirements for redactions from public records. After reviewing that order, we disagree with your characterization. The order does not discuss any rules that are universally applicable to redactions of information from public records. A public body may redact any information from a public record that is exempt from disclosure. Our January 16, 2008 Order applies the requirements of a specific exemption – the confidential submissions exemption of ORS 192.502(4) – to a set of facts, and concludes that the exemption is inapplicable. Thus, the order concludes, the information in question was improperly redacted. It is not the case that every redaction must meet the requirements of the confidential submissions exemption.

> to discipline, counseling, membership activity, other behavioral records, professional preparation and experience, professional performance (e.g., assignment and work-load, quality of teaching -- including records tabulated from students' classroom survey evaluations -- research, and service to the institution), personnel data relating to such matters as promotions, tenure, leaves, retirement credits and the like, and professional activities external to the institution, including but not limited to, awards, recognition, research activity, or travel.

Of these categories, only the fourth, Personal Records, are "specifically designated as confidential" as required by ORS 351.065(5). *See* OAR 571-030-0015.

The University has informed us that, except for records containing only one or more of the types of information described in OAR 571-030-0010(1) – (3), UO understands its rules to designate as confidential any record that ORS 351.065 would allow UO to designate as confidential.[3] Although it is certainly possible to construe UO's rules differently, we cannot say that the interpretation expressed by UO in writing to this office is unreasonable.[4] As would a court, we defer to UO's reasonable interpretation of its rules. *See* ***Don't Waste Oregon Committee v. Energy Facility Siting Council***, 320 Or 132, 142, 881 P2d 119 (1994) ("Where [an] agency's plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, there is no basis [to] assert that the rule has been interpreted 'erroneously.'") We also assume that UO's rules are valid under the statute.[5]

The question thus becomes whether the materials withheld by UO are records that could properly be considered confidential under ORS 351.065. To be deemed not public records under that statutory section, records must be "personnel records." Again, subsection (5) provides that "[a]ny category of personnel records specifically designated as confidential pursuant to valid rules or orders pursuant to [ORS 351.065] shall not be deemed a public record." Subsection (6) defines "personnel records" to mean

> records containing information kept by the institution, division or department concerning a faculty member and furnished by the faculty member or by others

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[3] UO notes that context may provide information that is not present on the face of a record. The University offers the example of a request for a list of all faculty members who requested leave to deal with mental health problems over the last three years, noting that a responsive document may consist solely of names. We agree that information can inhere implicitly in a document as the result of the surrounding context.

[4] The rules appear to confuse the concepts of "records" and "information." UO's interpretation resolves that confusion essentially by placing the rules in context: rules about records should be understood to apply to records, rather than information. Focusing more on text, we think it could reasonably be argued that UO's rule defines information of certain kinds *as* records of specified types. But we cannot say that UO's interpretation is inconsistent with the text of the rule viewed in its context.

[5] In general, rules are entitled to a presumption of validity. ***Springfield Education Ass'n v. Springfield School Dist. No. 19***, 290 Or 217, 227-228, 621 P2d 457 (1980) ("An agency interpretation may be given an appropriate degree of assumptive validity" in many circumstances). Faced with a direct challenge to a rule, we may find it necessary to consider the validity of a rule implementing the public records law or an exemption to that law. As we discuss below, the materials withheld in response to your request meet the statutory definition of "Personnel Record." It follows that UO's rules may validly reach those materials.

> about the faculty member at the member's or at the institution, division or department's request, including, but not limited to, information concerning discipline, membership activity, employment performance or other personal records of individual persons.

If the materials withheld are consistent with this definition, and contain some information other than "information generally needed in locating a particular academic staff member," "information as to" academic achievements, and "salary information," then under UO's reasonable interpretation of its rules, the materials "shall not be deemed a public record" per ORS 351.065(5).

II. The Records

Our office has reviewed the materials UO withheld in responding to your request. The records fit into four categories. First, there are a number of "Nomination Forms" that "nominate" certain individuals "for inclusion in" the UMRP. UO indicates that you received a blank version of this form, and our records are in accord. The forms withheld were filled out with respect to individual academic staff. Second, there are a number of memorandums prepared by UO's Affirmative Action & Equal Opportunity Analysis with respect to those nominations. Third, there are spreadsheets listing newly hired faculty for each year from 2003-2004 through 2007-2008. These provide details for each new hire, with columns for: "Name", "Arrival", "Acad Rank/Title", "Tenure Status", "Department", "Gender", "Ethnicity", "Starting AR", "Highest Degree", "Year of Degree", "UMRP Awarded?", "Total UMRP Distribution", "VP Rach Start-up Support", "VP Rach New Faculty Awards", "Other Start-up Support", and "Total Support". Finally, there are two additional spreadsheets, each one titled "University of Oregon Underrepresented Minority Recruitment Program Faculty Diversity Report" and dated January 15, 2004 and February 17, 2005, respectively. These were attachments to memorandums written by Lorraine Davis, which you received: one addressed to Yvette Weber Davis on January 30, 2004, and the other addressed to George Pernsteiner on February 17, 2005. They include a number of columns comparable to those appearing on the other spreadsheets, including columns for "Ethnic Designation" and "Sex". However, these spreadsheets are different in that presence on the list itself indicates that a faculty member is supported by the UMRP. In addition, these spreadsheets provide less financial detail and list expenditures for each of four years.

Each document withheld contains some information other than directory information, academic achievement information, or salary information. Most pertinently, each document indicates that one or more specific individuals belongs, or has been designated as belonging, to an ethnic group specified for each particular individual. The fact that the information is not limited to the type contained in documents that "may be released upon request and without the faculty member's consent" resolves half of our inquiry. It remains only to ask whether the materials withheld meet the statutory definition of personnel records.

III. Personnel Records under ORS 351.065

For reasons that follow, we determine that the materials withheld are "personnel records" within the meaning of ORS 351.065(6). The definition has been set forth at p. 4, above. In our view, that definition is met where

- A record contains information concerning a faculty member;
- The information was provided by the faculty member, or by someone else at the request of the University;
- The information is similar in kind to the list of information that the statutory definition "include[s] but [is] not limited to."

Information about ethnic minority status is information that concerns a faculty member. That information will often have been provided by the person through self-identification; alternatively, it may be provided by another person, such as a supervisor or Human Resources employee, for University purposes.[6] The only remaining question is whether the information is similar in kind to the list of information that forms an illustrative part of the statutory definition of personnel records. We have no trouble concluding that it is sufficiently similar.

The illustrative list includes "information concerning discipline, membership activity, employment performance or other personal records of individual persons."[7] We believe that the nomination forms and the evaluation memorandums regarding those nominations are akin to the listed records in that they are relevant to participation in a University program, and in that they contain information about an individual's ethnicity, which is "personal." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged Ed., 2002) offers a number of definitions for "personal," including, "1 : of or relating to a particular person : affecting one individual or each of many individuals : peculiar or proper to private concerns : not public or general." WEBSTER'S at 1686. The spreadsheets contain information that "concerns" the nomination records. According to WEBSTER'S, the verb "concern" means, pertinently, "**1 a** : to relate or refer to : be about." WEBSTER'S at 470. Specifically, both spreadsheets contain information that "relate[s] to" the UMRP nomination process in that both spreadsheets document the individuals whose nominations were accepted by the University. Because they contain information about ethnicity, the spreadsheets also independently contain "personal" information.

In short, all four categories of records withheld by UO fit within the statutory definition of "personnel records". Combined with our conclusion that the records contain information other than the types described at OAR 571-030-0010(1) – (3), it follows that the records are "Personal Records" under OAR 571-030-0010(4) as UO reasonably interprets that rule. Because "Personal Records" are "designated as confidential" by OAR 571-030-0015, they are not public records under ORS 351.065(5). The separation rule of ORS 192.505, applicable to "any public

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[6] In fact, OAR 571-030-0020(2) provides, in part, that "Except as the faculty member makes the * * * information available, there shall be no designation in faculty personal records as to the faculty member's race, religion, sex, or political affiliation."

[7] Like UO's rule, the last item on this list, when read in context, appears to conflate "records" and "information." Read literally, it reaches "information concerning * * * other personal records." We think the probable intent is to reach records containing information that is derived from or similar to information contained on personal records, rather than information "concerning" personal records. In light of our analysis, we need not labor over this point.

record," consequently does not apply. Under these circumstances, we are without power to grant your petition, and therefore respectfully deny it.[8]

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

DM935803
c: Doug Park, UO

[8] In your petition, you state that UO has elsewhere offered to sell you this information. The University explains that any estimate it has provided you would cover the cost of making non-exempt public records available and the cost of removing materials that UO is not required to disclose.