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January 16, 2008

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Ryan James Hagemann, JD
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Re: Petition for Public Records Disclosure Order
Oregon University System Records

Dear Mr. Harbaugh and Mr. Hagemann:

This letter is the Attorney General's order on Mr. Harbaugh's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. The petition, which we received via email on December 21, 2007, asked the Attorney General to direct the Oregon University System (OUS) to provide a copy of a consultant's report surveying the compensation for certain college presidents, which OUS obtained to determine the appropriate compensation for its presidents.

By email and email attachment, Interim Deputy Chancellor for Legal Affairs Ryan Hagemann provided the report, but redacted the names of the presidents and institutions surveyed in the report other than those within the Oregon University System. By email dated January 3, 2008, Mr. Hagemann explained that he had redacted the presidents' and institutions' identities, because "[i]n gathering this information from various presidents, [the consultant] informs the presidents that it will do so confidentially." Mr. Harbaugh responded via email on the same day requesting this office to address the legality of the redactions. To facilitate that review, Mr. Harbaugh extended the time for our response until January 16, 2008.

OUS redacted the identities of those surveyed on the ground that when its consultant had approached presidents and institutions it had told them that it did so in confidence. OUS, therefore, contends that it could redact the institutions' and presidents' identities pursuant to the exemption for "confidential submissions" contained in ORS 192.502(4). That statute exempts from public disclosure:

> Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

The OREGON ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2005) (MANUAL) says the following with respect to this particular exemption:

> There are no less than five conditions that must be met for the exemption to apply[:] * * * [1] The informant must have submitted the information on the condition that it would be kept confidential[;] [2] The informant must not have been required by law to provide the information[;] [3] The information itself must be of a nature that reasonably should be kept confidential[;] [4] The public body must show that it has obliged itself in *good faith* not to disclose the information; [and 5] Disclosure of the information must cause harm to the public interest.

MANUAL at 69.

We begin by addressing the third of these conditions -- that "[t]he information itself must be of a nature that reasonably should be kept confidential" – because we conclude that it is not met in this case. MANUAL at 69. That condition "would generally be met if disclosure of the information is restricted by statute or contract or is exempt from disclosure under other exemptions of the Public Records Law. *If the information is publicly available, obtainable or observable, it cannot reasonably be considered confidential.*" MANUAL at 71 (emphasis added).

Information concerning the compensation of public college presidents appears, generally, to "be publicly available or obtainable" and, therefore, "cannot reasonably be considered confidential." Public colleges' executive compensation information generally is publicly available through the public records laws of the states in which the institutions are located. Moreover, at least one source, the Chronicle of Higher Education compiles that information for 150 four-year public colleges and 800 private colleges and publishes it annually for benefit of subscribers. http://chronicle.com/indepth/compensation, last visited January 10, 2008. It obtains the compensation information for tax-exempt private colleges by requesting their IRS 990 forms, which include that information and must be publicly disclosed, upon request, pursuant to IRS regulations. Accordingly, we conclude that college presidents' compensation information is generally not "of a nature that reasonably should be kept confidential."

Given the wealth of publicly-available information about public college presidents' compensation, the fifth condition of ORS 192.502(4), that "the public interest [must] suffer by

disclosure" is not met either. "This condition requires consideration not only of the impact of the disclosure on the particular informant providing the information but also of the likelihood that disclosure would discourage other informants from providing information in confidence in the future." MANUAL at 71.

The purpose of the consultant's report in this case was to provide accurate, up-to-date comparison compensation information on which to make compensation decisions for Oregon's public college presidents. As discussed above, information about public college presidents' compensation is widely available through public records requests and on at least one website, which states that the information is current through the fiscal year ending June 30, 2007. Given the publicly available nature of the information, OUS should be able to gather enough information for its purposes without having to promise confidentiality. On the other hand, the public has an interest in knowing which institutions OUS considered comparable and relied on to determine appropriate compensation for presidents of OUS institutions.

For the above reasons, we conclude that ORS 192.502(4) is inapplicable. We grant your petition to receive an unredacted copy of the consultant's report, which shows the names of the surveyed institutions and their presidents.

OUS has seven days from the date of this order in which to comply.[1] ORS 912.450(2).

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

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[1] OUS may charge a fee to reimburse it for its actual cost in making such records available, including for photocopy costs and time spent by agency personnel reviewing records. *See* ORS 192.440(3).