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July 24, 2008

Tom Rios
Business Representative
Ironworker Local 29
P.O. Box 7295
Klamath Falls, OR 97603

Re: Petition for Public Records Disclosure Order
Oregon Bridge Delivery Partners' Records

Dear Mr. Rios:

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. Your petition, which we received on June 26, 2008,[1] asks the Attorney General to direct the Oregon Bridge Delivery Partnership (OBDP) to produce copies of the Certified Payroll Records for Harris Rebar and Holm II, subcontractors of OBDP.[2] Your request for records was made to Larry Lewter, employed by OBDP as a project manager on the Eastern Oregon project, I-84 Corridor, Boardman to Ontario. Mr. Lewter forwarded the request to Laurie Sletten, CRM, CA for OBDP. She referred you to the Oregon Department of Transportation (ODOT), with the explanation that OBDP is a private company, and is not able to release the payroll records you requested. ODOT, as a public body, routinely releases the type of information requested. Your petition to the Attorney General argues that OBDP should be treated as functionally equivalent to a public body. For the reasons that follow, we deny your petition.

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. Custodians of public records are required to make those records available for inspection or copying unless the records are exempted from disclosure by statute. ORS 192.430(1). A custodian is "a public body mandated,

[1] We appreciate your agreement to extend the time for us to respond to your petition.

[2] We note that although your petition refers to Harris Rebar and Holm II, the copy of the letter to Larry Lewter, included with your petition, requests payroll records for Idaho Harris Rebar (ABCO Inc.) and asks if any Holm II employees assisted Harris employees. However, this discrepancy does not affect our analysis.

directly or indirectly, to create, maintain, care for or control a public record." ORS 192.410(1). A "public body" includes every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council or agency thereof; and any other public agency of this state. ORS 192.410(3). "State Agency" is defined to mean any state officer, department, board, commission or court created by the Constitution or statutes of this state. ORS 192.410(5). Thus, OBDP is required to provide an opportunity to inspect the specified payroll records only if OBDP is a "public body". Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the record to determine if it may be withheld from public inspection. ORS 192.450(1).

The Public Records Law does not specify what determines whether a body is public or private. However, in ***Marks v. McKenzie High School Fact-Finding Team***, 319 Or 451, 878 P2d 417 (1994), the Oregon Supreme Court analyzed whether a fact-finding team comprised of private citizens but established at the initiative of a school district, was subject to the Public Records Law. A review of the text, context and legislative history of the Public Records Law did not disclose whether the legislature intended to apply the Public Records Law to an entity such as the fact-finding team. *Id.* at 456-457, *citing* ***PGE v. Bureau of Labor and Industries***, 317 Or 606, 610-612, 859 P.2d 1143 (1993). Therefore, the court considered how the legislature would have intended the statute to be applied had it considered the issue. ***Marks*** at 457, *citing* ***PGE***, 317 Or at 612. The court concluded that the legislature would have intended for the resolution of this issue to depend on the character of that entity and the nature and attributes of that entity's relationship with government and governmental decision-making, *id.* at 463. The court proceeded to identify and apply a set of factors that bear on that question:

(1) The entity's origin (*e.g.*, whether the entity was created by government or had some origin independent of government).

(2) The nature of the function assigned to and performed by the entity (*e.g.*, whether that function is one traditionally associated with government or is one commonly performed by private entities).

(3) The scope of the authority granted to and exercised by the entity (*e.g.*, does the entity have the authority to make binding governmental decisions, or is it limited to making nonbinding recommendations).

(4) The nature and level of government financial involvement with the entity. (Financial support may include payment of the entity's members or fees as well as provision of facilities, supplies, and other nonmonetary support.)

(5) The nature and scope of government control over the entity's operation.

(6) The status of the entity's officers and employees (*e.g.*, whether the officers and employees are government officials or government employees).

Id. at 463-464. The overall purpose of this test is "functional" The court noted that "no single factor is either indispensable or determinative" and indicated that its list was not intended to be exclusive. *Id.* at 463-464.

In weighing the significance of the various factors it identified, the court was guided by the need to protect the policies underlying the Public Records Law. *Id.* at 468. The court's goal was to glean "what the legislature would have intended" had it considered the issue of what makes an entity "public" for purposes of the Public Records Law. *Id.* at 457. The ultimate resolution turned largely on the failure to show that the entity in question

> was given any decision-making authority, other than the authority that [the entity] exercised over the conduct of the investigation. Without any greater decisionmaking authority, [the entity]'s investigation could have affected matters of public concern *only* through the vehicle of [the entity]'s report, which would have been accessible as a public record of the school board when submitted to the board.

Id. at 466 (emphasis in original). In sum, the court concluded that "because [the entity]'s operations were independent of government, and because [the entity] did not have any authority to make decisions for the school board, access to [the entity]'s records was not necessary to serve the policy goals behind the Inspection of Public Records Law." *Id.*

In previous Public Records Orders, we have determined that the Attorney General may review a petition claiming that an ostensibly private entity is the functional equivalent of a public body that is a state agency under the test articulated in ***Marks***. *See* ATTORNEY GENERAL'S PUBLIC RECORDS MANUAL (2008) ("MANUAL") at 3-4; see also Public Records Order, January 31, 2001, Hinkle; Public Records Order, September 3, 2002, Long; Public Records Order, November 19, 2002, Forrester; Public Records Order, March 29, 2004, Redden. In considering the factors identified by the Supreme Court, we bear in mind the purposes underlying the Supreme Court's "functional" test. Specifically, we think it significant that in weighing the significance of the various relevant factors, the court focused on whether "access to [the entity's] records [is] necessary to serve the policy goals behind the Inspection of Public Records Law." ***Marks***, 319 Or at 468.

Neither our office nor Oregon's appellate courts have had occasion to decide what consequences properly flow from a conclusion under the functional ***Marks*** analysis that an independent entity performs government functions.[3] We begin by exploring the proper consequences. We do so because our answer to that question obviates the need to examine in detail each of the numerous functions performed by OBDP under its contracts with ODOT, an undertaking that would be difficult if not impossible to thoroughly accomplish in the space of this Public Records Order.

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[3] We recognize that in *Laine v. City of Rockaway*, 134 Or App 655, 896 P2d 1219 (1995) the Court of Appeals found that a fire department had been a "functional agency or department of the city government" such that the *city* could be compelled to turn over fire department documents. However, the conclusion that a public entity includes one or more subparts is different from a conclusion that an independent entity is "functionally" a public entity. A city subject to the public records law obviously must disclose the records of its agencies and departments, as the court of appeals ruled in *Laine*. It does not follow that an independent entity that functions as a public body for some purposes must disclose records that are unrelated to any governmental function performed by the entity.

In addressing this issue, we note the possibility that a single entity could perform some functions that are governmental under the functional approach of ***Marks***, while performing other functions that would not meet that standard. That is, we can easily imagine a scenario in which an entity's relationship to government has numerous aspects, some of which might implicate the "policy goals behind the Inspection of Public Records Law" and others of which might not. In such a case, we do not believe that the correct approach would be to throw open all of the entity's records to public inspection simply because it may perform some governmental functions. It seems to us that the policies underlying the Public Records Law would be adequately protected in that kind of case by a rule subjecting an entity's records to disclosure under the Public Records Law only to the extent that the records are possessed pursuant to governmental functions being performed by the entity.

Like the court in ***Marks***, we are guided by our view of what the legislature would likely have determined had it considered this issue. Specifically, we believe that if the legislature had considered the ramifications of finding that an entity is the functional equivalent of a public entity, the legislature probably would have adopted the limited application of the public records law that we describe. That is, the legislature would have applied the public records law to the entity only to the extent that the entity's records were obtained or retained pursuant to governmental functions being exercised by the agency.

As a result, we do not broadly examine each of the functions performed by OBDP to determine whether any of them would justify a determination that OBDP is functionally equivalent to a state agency. Instead, we first examine the nature of the records you requested, and consider whether OBDP's possession of them is related to any function that should be considered "governmental" under the approach articulated in ***Marks***.

Once again, the records that you have requested are "certified payroll records." The contracts between ODOT and OBDP give OBDP a very limited role with respect to certified payroll records. Work Order Contract #10 to Agreement to Agree # 23856 requires OBDP to "Input certified payroll data for OTIA III and Pilot Area projects" and "Provide data input to MEAUR, Certified Payrolls, and Paid Summary reports."

We do not see anything remotely governmental about this data input function. Applying the ***Marks*** factors, in order, to those activities, yields the following:

(1) OBDP is a private entity formed by two private entities. This factor weighs in favor of finding that OBDP is not the functional equivalent of a public body.

(2) Reporting certified payroll information is "commonly performed by private entities." This factor weighs in favor of finding that OBDP is not the functional equivalent of a public body when it performs this data input for purposes of reporting.

(3) OBDP's certified payroll data input and reporting are subject to typical review by state government. That is, ODOT, DAS or BOLI may audit the data reported by OBDP just as the same agencies may audit equivalent data reported by any

contractor. This factor weighs in favor of finding that OBDP is not the functional equivalent of a public body when it provides ODOT with certified payroll data.

(4) OBDP earns the amounts it receives from its contract with OBDP. This factor weighs in favor of finding that OBDP is not the functional equivalent of a public body.

(5) ODOT exercises no control over OBDP's operation relevant to OBDP's reporting of certified payroll data. This factor weighs in favor of finding that OBDP is not acting as the functional equivalent of a public body when it provides ODOT with certified payroll data.

(6) OBDP's officers and employees are not government officials or government employees. This factor weighs in favor of finding that OBDP is not the functional equivalent of a public body.

As a result, we conclude that this record is not possessed by OBDP pursuant to any function that could be characterized as governmental.

We therefore do not address your broader assertion that some of OBDP's contractual tasks may make OBDP functionally equivalent to a state agency. Even if you were correct, we simply do not believe that the proper consequence would be to render OBDP wholly subject to the Public Records Law.

In sum, it is clear to us that the records you have requested – certified payroll records of entities other than OBDP – are records that OBDP does not possess in any capacity that is functionally governmental. OBDP simply reports the data to ODOT; OBDP does not have governmental powers with respect to the information contained in those records any more than would any other contractor reporting the same information. Because OBDP does not possess the requested exercise any governmental function with respect to those records, we find it unnecessary to address whether OBDP is the "functional equivalent" of a state agency when it performs other tasks under contract with ODOT. Requiring OBDP to disclose these records to you is not necessary to protect the policies underlying the Public Records Law.

We must respectfully deny your petition seeking an order that OBDP issue the records in question.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

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