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March 4, 2008

Brent Walth
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Re: Petition for Public Records Disclosure Order
Portland State University

Dear Mr. Walth:

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 February 15, 2008, and appreciate your agreeing to extend our deadline for issuing an order to 10 am on March 4. Your petition asks the Attorney General to direct Portland State University ("PSU") to make available all records pertaining to any meeting, discussion, or contact that has occurred since October 1, 2007, between State Senator Betsy Johnson and her attorney Gregory Chaimov, on the one hand, and any employee of PSU's Mark O. Hatfield School of Government, on the other. For the reasons that follow, we grant your petition as to the first four groups of documents and respectfully deny it as to the last group of documents.

A. Your Request.

You submitted your public record request to PSU on January 9, 2008. According to PSU, the only meeting, discussion, or contact that comes within the scope of your request occurred at 1 pm on October 26, 2007 between Dr. Ronald Tammen, who was and is the Hatfield School's director, and Senator Johnson and Mr. Chaimov at Dr. Tammen's PSU office. Senator Johnson had telephoned to request the meeting at approximately 10 am that morning. At that time, Dr. Tammen was also Board Chairman of the Regional Maritime Security Coalition (RMSC), a private non-profit that focuses on security issues surrounding river commerce.

PSU sorted responsive documents into six groups. PSU declined to release one group on the ground that the records were covered by the attorney-client privilege. Your petition does not

seek review of PSU's refusal to disclose those documents. PSU asserts that the other five groups of records are not "public records," and thus not subject to disclosure, because they relate solely to the affairs of the RMSC and not at all to those of PSU. Your petition disputes the withholding of those groups of documents. Therefore, the question is whether those documents are, or are not, "public records."

B. ORS 192.410(1)(a): Meaning of "Public Record"

The Public Records Law confers a right to inspect any "public record" of an Oregon public body, subject to certain exemptions and limitations. *See* ORS 192.420. Pursuant to section (4) of ORS 192.410:

> (a) "Public record" includes any writing that contains information relating to the conduct of the public's business, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.
>
> * * *

Our goal in interpreting a statute is to determine the intent of the legislature. ***PGE v. Bureau of Labor and Industries*** (***PGE***), 317 Or 606, 610, 859 P2d 1143 (1993). We start by examining the provisions' text and context, with the text being the best evidence of legislative intent. *Id.* The text of subsection (4)(a) makes clear that a writing is a public record if it meets two criteria, namely, it (1) "contains information relating to the conduct of the public's business," and (2) was or is "prepared, owned, used or retained" by a public body.

C. The Documents.

PSU supplied our office with all documents that it considered to be covered by your request. Following the October 26 meeting with Senator Johnson and Mr. Chaimov, Dr. Tammen prepared a memorandum of that same date "for the record" describing the substance of the meeting; the memorandum was prepared on his PSU computer. Dr. Tammen also gave an oral report of the meeting to an RMSC colleague, who prepared his own memorandum "to file."

According to the memoranda, a current RMSC employee had worked for the Port of St. Helens when Senator Johnson was on its Board of Commissioners. Again, according to the memoranda, Senator Johnson and the RMSC employee were in conflict and the employee had made various accusations against Senator Johnson. Dr. Tammen's memo asserts that Senator Johnson stated that

> she would do everything in her power to protect herself [from the former Port employee's accusations] and that anyone or **any organization** associated with [the employee's] effort should be so warned. Since I took this as a threat to the RMSC, I again indicated that our nonprofit had nothing to do with any of these allegations. (Emphasis in original.)

On October 29, Dr. Tammen submitted a written resignation of his position as RMSC Board Chairman. The resignation provides in relevant part:

> As a consequence of a meeting held in my office last Friday, I find myself in a serious conflict of interest situation. I have concluded that decisions made on behalf of RMSC may have a negative impact on the Hatfield School of Government and decisions made on behalf of the Hatfield School could have a negative impact on RMSC. This places me in an untenable position that can only be remedied by my stepping down as President of RMSC.
>
> I wish there was another solution to this dilemma since it involves two organizations which have my full confidence and commitment but having given careful consideration to this over the weekend, it is the only outcome which will protect both. * * * * .

D. Analysis.

The first question is whether the documents, especially the memoranda, "contain information relating to the conduct of the public's business." ORS 192.410(4)(a). The answer is "yes" if the meeting concerned PSU business *or* if Senator Johnson appeared at the meeting in her capacity as a state senator.

In a suit filed under elements of the Public Records Law, "the burden is on the public body to sustain its action." ORS 192.490(1). This statute assigns the burden of persuasion to the public agency resisting a request for records. *See* ORS 40.105 ("A party has the burden of persuasion as to each fact the existence or nonexistence of which the law declares essential to the claim for relief or defense the party is asserting.") Where the evidence as to a disputed fact is in equipoise, the trier of fact cannot find in favor of the party bearing the burden of persuasion. *See, e.g.,* ***State v. James***, 339 Or 476, 486 (2005).

Our role in the Public Records Process occasionally requires us to determine the facts applicable to a Petition. Although ORS 192.490(1) does not expressly govern our resolution of factual contests raised by a petitioner's claim and the resisting agency's denial, we believe that the statute should guide our decision when the evidence and most reasonable inferences from that evidence do not predominate in favor of the agency. In addition to being consistent with the standard by which a court would resolve factual disputes arising in a judicial proceeding, assigning the burden of persuasion to the agency for purposes of ruling on a petition to compel disclosure of records also serves the principle applicable to all public records:

> Every person has a right to inspect any public record of a public body in this state, *except* as otherwise provided in ORS 192.501 to 192.505.

ORS 192.420(1). Emphasis added.

In its denial of your request, PSU asserts that "Dr. Tammen was acting, not as a public official on the public's business, but in a private capacity for a private organization as the Board President or (post-resignation) as a Board member." Email, Chip Lazenby to Brent Walth, January 28, 2008. You assert that "Dr. Tammen in fact played a public role as an official with PSU. To the degree he had a private role, it was at the time inextricably tied to his public role, as he made clear in his resignation letter." Petition at 3.

The best evidence submitted to us of the roles played by Dr. Tammen and Senator Johnson, respectively, is Dr. Tammen's resignation letter, taken in context of Dr. Tammen's account of the meeting that occurred three days before. The letter opaquely states that "decisions made on behalf of RMSC may have a negative impact on the Hatfield School of Government and decisions made on behalf of the Hatfield School could have a negative impact on RMSC." Dr. Tammen did not enumerate the "decisions," the "negative impacts," or the linkage he perceived to exist between them.

Respectfully, we find PSU's interpretation of Dr. Tammen's role more persuasive than yours. The resignation does not make "clear" that Dr. Tammen acted in his public capacity as head of the Hatfield School of Government. According to PSU, RMSC is a private non-profit corporation, created by private interests, lacking any formal relationship with PSU, and dedicated to a different mission than PSU. The individual to whom Senator Johnson referred, according to Dr. Tammen, was an employee of RMSC, not an employee of PSU. Dr. Tammen chose to invite an employee of RMSC to be available to answer any technical questions that might arise during the meeting. He apparently did not extend a similar invitation an employee of PSU. According to PSU, Dr. Tammen transmitted his resignation to fellow members of RMSC's board. We are aware of no claim that Dr. Tammen transmitted his resignation to his colleagues at PSU. And, although the meeting took place on PSU's premises and Dr. Tammen used PSU's computer system to generate at least some of the records you requested, PSU correctly asserts that neither fact controls the characterization of those records for purposes of the Public Records Law. *Accord,* AG's Public Records and Meetings Law at 7 ("All documents in the possession of a public officer or agency employee are not necessarily public records.").

These facts suggest that Dr. Tammen acted during the meeting as head of RMSC, rather than as head of PSU's Hatfield School of Government. We conclude that the available evidence on this point predominates in favor of PSU's characterization of Dr. Tammen's role. PSU carried its burden as to Dr. Tammen's role. Accordingly, if resolution of Dr. Tammen's role were the only question we needed to answer in ruling on your petition, we would deny your petition on the ground that the records compiled by Dr. Tammen and held by PSU do not "contain information relating to the conduct of the public's business."[1]

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[1] In support of your characterization of Dr. Tammen's role, you also assert that PSU's alleged declaration that Dr. Tammen's resignation letter was a "public record" is inconsistent with PSU's subsequent claim that Dr. Tammen acted in a private capacity during the meeting with Senator Johnson. Petition at 3-4. "[The] fact that particular information qualifies for exemption from disclosure does *not* necessarily mean that a public body is prohibited from disclosing the information." AG's Public Records Manual at 23. An agency's decision to release a particular record merely evidences its choice to release that record – it has no legal significance for a subsequent choice to assert an

As to Senator Johnson's role, however, we conclude that the evidence available to us is in equipoise. That is, it neither establishes that Senator Johnson acted in a personal capacity nor that she acted in her official capacity.

You assert:

> Finally, PSU's argument that Dr. Tammen was acting in a private role ignores that Dr. Tammen is not the only public official involved. Sen. Johnson was involved, and no one questions that she is a public official, acting in a public role, and (in Dr. Tammen's view) raising issues that relate to the public's business. In other words, Johnson made the meeting relevant to public matters, and any records that describe what happened there are "related to the public's business," as defined in 192.410(4)(a). Sen. Johnson's actions places this matter directly in the public realm. * * *

Petition at 4.

PSU's denial of your request did not characterize in any way Senator Johnson's role during the meeting with Dr. Tammen. Dr. Tammen's resignation letter, taken in context of Dr. Tammen's account of the meeting that occurred three days before, is again the best evidence by which to evaluate your assertions. We infer that Dr. Tammen's reference in his resignation letter to "a meeting held in my office last Friday" is a reference to the meeting with Senator Johnson. We infer that "decisions made on behalf of RMSC" refers to the RMSC's employment of the individual reportedly mentioned by Senator Johnson during that meeting.

In his letter of resignation, as we interpret it, Dr. Tammen speculates that RMSC's employment of the individual reportedly mentioned by Senator Johnson may have a negative impact on the Hatfield School of Government. The "negative impact" could be a reference to something that Dr. Tammen feared Senator Johnson would do as a private individual. If that were the case, then both Dr. Tammen and Senator Johnson would have been acting as private individuals during the meeting, and, therefore, the records would not fall within the definition of "public records." Or, the phrase could express a fear that Senator Johnson would use her public position in a way that adversely affected the Hatfield School of Government. In that case, Senator Johnson would have been acting as a public official during the meeting, and the records compiled by Dr. Tammen or his RMSC associate during and as a result of the meeting would "contain information relating to the public's business." We cannot determine, based on the information available to us, whether the evidence predominates in favor of the former conclusion or of the latter.

As noted above, where the evidence is in equipoise on a point necessary for PSU to prevail, we must reject PSU's objection to production of the records you seek. Therefore, for purposes of applying the Public Records Law to your petition, records compiled by Dr. Tammen

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available exemption from disclosure or, in the context of your petition, to assert that the contested record is not a "public record" at all.

or his RMSC associate during and as a result of the meeting are "public records" as defined in ORS 192.410(1)(a).

The second question is whether the records were or are "prepared, owned, used or retained" by PSU. ORS 192.410(1)(a). We understand that the records were retained in electronic form on a PSU computer. Further, we infer that Dr. Tammen's resignation from his position as head of RMSC was motivated, in part, by his desire as head of the Hatfield School of Government to insulate the latter from "negative consequences" he feared might flow from his meeting with Senator Johnson. In other words, PSU's agent – Dr. Tammen – acted for the agency on the information he had obtained from Senator Johnson in his private capacity as head of RMSC. In short, PSU "used" the information.

The foregoing applies to the first three groups of documents. The fourth group concerns the FBI's request that Dr. Tammen submit to an interview about the October 26 meeting. This request was treated by PSU officials as a matter of concern to the university. The writing is therefore a public record. The fifth group concerns press inquiries of Dr. Tammen about the meeting and clipped newspaper articles about Senator Johnson. This group does not meet the second criterion for a public record.

For the reasons stated above, we grant your petition as to the first four groups of documents and order PSU to disclose them. We respectfully deny your petition as to the last group of documents.

Sincerely,

Peter D. Shepherd

PETER D. SHEPHERD
Deputy Attorney General

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cc: Henry Lazenby, Jr., Portland State University