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August 29, 2007

William T. Harbaugh
Department of Economics
1228 University of Oregon
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Re: Petition for Public Records Disclosure Order
University of Oregon Records (Petitions 9.0 and 9.51)

Dear Mr. Harbaugh:

This letter is the Attorney General's order on your petitions (labeled 9.0 and 9.51) for disclosure of records under the Oregon Public Records Law. We received your original petition via email on August 22, 2007. The petition asks the Attorney General to direct the University of Oregon (UO) to make available "any emails, letters, or notes produced by, or received by AAEO Director Penny Daugherty or produced by or received by UO General Counsel Melinda Grier, dealing with the question of whether Dr. Martinez's initial hire, and the subsequent conversion to regular status were or were not made * * * in accordance with the University's hiring rules and with Affirmative Action Equal Opportunity Rules."

On August 27, 2007, we received a second petition related to the same documents and information, and which reiterates your earlier request that the Attorney General order UO to waive the cost of providing the documents.[1]

For the reasons that follow, we respectfully deny both petitions.

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[1] The August 27 petition also requested that the Attorney General "explain the procedures that [his] office has used to deal with the conflict of interest inherent in having the Attorney General deal with a public records petition involving a subordinate Special Assistant Attorney General." You have recently repeated this request in several other petitions for public records orders. Because this is an inquiry regarding Department of Justice policies or procedures in a public records order, rather than a petition for issuance of an order within the Attorney General's authority, it is unnecessary and inappropriate to respond to that inquiry in this order. We will, however, respond to your questions in separate correspondence.

Petition for Disclosure of Records

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. Any person who is 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 and determine if it may be withheld. ORS 192.450(1). But the Attorney General may order a state agency to disclose records only when the agency has denied a request for the records. *See* ORS 192.450(1).

In a response dated August 23, 2007, UO General Counsel Melinda Grier agreed to provide you with the records you requested after you pay $199, the estimated cost of providing the records. Ms. Grier stated that some of the records may contain legal advice that would be exempt from disclosure, and would require redaction. (Letter, Grier to Harbaugh, August 23, 2007). Based on this response, we conclude that UO has not denied your request to produce the record. Therefore, as to the request to provide the document, your petition for a public records order is moot.

Petition for Fee Waiver

The Public Records Law permits a public body to charge fees "reasonably calculated to reimburse it for its actual costs" in making the records available. ORS 192.440(3). "Actual costs" include the time agency staff spends locating the records, researching its records for the requested material (even if it does not locate any requested records), supervising a requestor's inspection of the records to protect the records' integrity, copying, certifying, and mailing the requested records, and separating exempt from non-exempt material. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2005) at 12-14 ("MANUAL"). See also Public Records Order, May 17, 1999 (Smith); Public Records Order, May 10, 1996 (Kelly); Public Records Order, May 4, 1994 (Dixon). A public body may require prepayment of its estimated charges before taking further action on a request. MANUAL at 13.

An agency may waive its fees for furnishing records pursuant to a public records request when it determines that it is in the public's interest to do so "because making the record available primarily benefits the general public." ORS 192.440(4). A person who believes that an agency has unreasonably denied a fee waiver may petition the Attorney General for review of that denial, ORS 192.440(5), as you have done. In reviewing an agency's denial, we use a three-part test to determine: (a) whether a waiver is prohibited by law; (b) whether the "public interest" test is met; and (c) whether the agency's decision was "unreasonable." MANUAL at 16. Because our analysis of the third point persuades us that UO's decision not to waive the fee was reasonable, we do not address the other two points; rather, we assume that the waiver is not prohibited by law and that the "public interest" test is met by your request.

Background

Since April 2007, you have made many requests of UO for public records and requests for information posed as questions, rather than as requests for public records. For example, you asked for the following information or records from UO employees and officers:

- On April 25, you asked P. Mendoza and L. Stull a question about eligibility for funds from Underrepresented Minority Recruitment Program (UMRP);
- On April 26, you asked C. Martinez several questions related to the UO affirmative action plan and for a copy of the application form used in the UMRP application process;
- On April 30, you asked C. Martinez questions related to allocation of UMRP funds and data for the determining under-representation under the UMRP;
- In May, you asked C. Martinez a series of questions related to a report you expected to be presented to the University Senate;
- On May 10, you asked M. Grier for copies of employment contracts for a vice provost;
- On May 15, you asked S. Runberg for copies of information on salary or consulting payments to a vice provost and M. Grier for information about the number of vice provosts with an administrative appointment of less than 1 FTE;
- On May 16, you asked M. Grier for copies of employment contracts for the affirmative action/equal opportunity director and for copies of consulting contracts between UO and outside firms relating to preparation of plans and reports;
- On May 16, you asked President Frohnmayer a series of questions related to under-representation of minorities among various UO faculty groups;
- On May 17, you asked M. Grier for contract language explaining the nature of agreements between UO and a vice provost that governed his commitments to another entity;
- On May 27, you asked L. Brady for a copy of a report related to the URMP prepared in mid 2006; and
- On June 1, you asked J. Burton for a list of members of the diversity advisory committee, together with their email addresses.

This list is not exhaustive. Indeed, this office issued a Public Records Order on September 5, 2006, finding that UO's decision to deny a waiver of a $150 fee for copies was not unreasonable, given the amount of staff time that UO had spent researching and responding to your requests for documents. Public Records Order, September 5, 2006 (Harbaugh).

The UO has answered some questions and provided some of the documents that you have requested without charging you for the cost of producing the information and documents you have requested. Most recently, the UO has informed you that it will no longer waive costs unless the records that you requested are readily available electronically.

Analysis

Even when a waiver of fees is in the public interest, the agency retains discretion whether to grant the waiver. *In Defense of Animals v. OHSU*, 199 Or App 160, 189, 112 P3d 336 (2005). The agency decision must be "reasonable." *Id.* Reasonableness is an objective standard that depends upon all the circumstances surrounding the request. *Id.*, 199 Or App at 190. In the past, we have looked to the following factors to determine whether an agency's decision to deny a fee waiver is reasonable: the financial hardship on the agency; the extent of time and expense and interference with the business of the agency; the volume of the records requested; the need to segregate exempt from non-exempt materials; and the extent to which an inspection of the records is insufficient for the public interest, given the particular needs of the requester. MANUAL at 19.

In this case, we conclude that, given the number and frequency of public records requests that you have made, given the need to review the requested records to determine whether they contain privileged legal advice, and given the time that UO staff has already spent responding without charging you for that time, UO's refusal to waive the fee is not unreasonable. As noted above, you have made several requests for public records or for information related to public records from UO over the past months. The requests have been delivered to various people at UO and UO already has waived a significant amount of fees by not charging you for the staff time required to locate and gather records that respond to your various requests. Most recently, in fact, UO sent you 75 pages of records by email without charge. (Email from B. Whalen to Harbaugh, August 23, 2007).

UO, through its General Counsel Melinda Grier, has informed you that it will no longer waive fees unless the records that you request are readily available electronically. In light of these circumstances, we cannot say that UO's decision is unreasonable. Accordingly, we deny your petition for a fee waiver or reduction.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS20223
c: Melinda Grier, University of Oregon