HARDY MYERS
ATTORNEY GENERAL

PETER D. SHEPHERD
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400
TTY: (503) 378-5938

October 16, 2006

Susan Davis
Success for All Foundation
200 W. Towsontown Blvd.
Baltimore, MD 21204-5200

Re: Petition for Public Records Disclosure Order
University of Oregon Records

Dear Ms. Davis:

This letter is the Attorney General's order granting, in part, and denying, in part, your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. We received the petition from Cheryl Sattler on July 7, 2006.[1] Ms. Sattler requested "emails to and from University of Oregon personnel Drs. Carnine, Simmons, and Kame'enui, relating to reading and reading policy." (Letter of July 5, 2006, from Sattler to Attorney General Myers). For reasons that follow, we grant the petition in part and deny it in part.

In a letter dated June 9, 2006, University of Oregon's Deputy General Counsel Randy Geller denied the request as to messages to and from Drs. Simmons and Kame'enui in reliance upon various provisions of Oregon law. The University did not document the particular reason for refusing to disclose any individual email. Mr. Geller's letter reported that the University would respond separately as to messages to and from Dr. Carnine and, as we understand it, Ms. Sattler asked Mr. Geller to postpone reviewing the Carnine records.

We spoke to Ms. Sattler to clarify her original request. She explained to Senior Assistant Attorney General Wendy Robinson that she did not want records relating the scheduling and arranging of conference attendance and presentations, conference announcements, or conference evaluations; forwarded articles from newspapers or other periodicals; notices about grant applications or about reports; notices about University of Oregon computer use policies; job announcements; or requests to forward copies of published materials.

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[1] We appreciate Ms. Sattler's extending the time within which the law would have otherwise obligated us to issue an order to October 16.

On September 1, 2006, Ms. Sattler asked us to substitute your name for hers as the recipient of the documents. We have done that.

On September 9, 2006, Mr. Geller sent Ms. Sattler several pages of material in response to the request. Because the University has provided copies of those pages of records, we respectfully deny the petition as to those records. In addition, because the University has not denied the request as to messages to and from Dr. Carnine, based upon Ms. Sattler's request that the University stop processing that request, we deny the petition as to those records as moot. Finally, we deny the petition as to the messages to and from Dr. Kame'enui because Dr. Kame'enui has agreed to waive any privacy right he may have in those messages and the University has, therefore, agreed to produce them.[2]

We have spent many hours reviewing the remainder of the email messages to determine whether they were subject to release. We have concluded that some of the records withheld by the University are probably subject to disclosure. Rather than enter a record-by-record order of disclosure, we hereby grant your petition in part by ordering the University to disclose the records or, in the alternative, identify the particular exemption the University claims applies to a given record.

Any person has the right to inspect any nonexempt public record of a public body. ORS 192.420. The law requires that the custodian of public records furnish proper and reasonable opportunities for inspection of records in the office of the custodian. ORS 192.430. Any person denied the opportunity to inspect public records may petition the Attorney General to determine whether the record may be withheld from public inspection. ORS 192.450(1). The public body bears the burden of sustaining its decision to withhold records from disclosure. *Klamath County School District v. Teamey*, 207 Or App 250, 254, 140 P3d 1162 (2006).

The University has produced thousands of pages of email messages for our review in response to the petition. Many of the exemptions cited by the University require a highly fact-intensive review. Because the University has not associated any particular record with any particular exemption, we are unable to determine which exemption was applied to which record or, consequently, whether an exemption was properly applied. It is therefore necessary for the University to specify which exemption applies to each document that it intends to withhold from disclosure.

Many of the records appear to have been withheld as faculty personnel records. As a general rule, faculty personnel records of the Oregon State System of Higher Education are exempt from disclosure under the Public Records Law because they are not public records. *See, e.g.,* Public Records Order dated April 8, 1987 (Gross/Hynes). ORS 351.065 authorizes the State Board of Higher Education (the board) to adopt rules and orders restricting access to faculty personnel records.

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[2] Dr. Kame'enui's records must nevertheless be redacted to eliminate student records subject to, for example, the federal Family Educational Rights and Privacy Act (FERPA), 20 USC sec. 1232g, and the exemption for student email addresses, ORS 192.501(29).

"Personnel records" are defined as

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

ORS 351.065(6). Pursuant to ORS 351.065, the board has adopted rules that restrict disclosure of faculty personnel records, except in accordance with those rules. *See* OAR 580-022-0060 to 580-022-0125. Absent the faculty member's consent, a valid subpoena, court order or other legal mandate, the board's rules permit disclosure of faculty personnel records to persons serving in an official institutional capacity who have a legitimate need to review the records to fulfill their official professional responsibilities. OAR 580-022-0095(1). The faculty member's consent must be in writing under the University's rules. OAR 571-030-0010(4). You are not entitled to faculty "personnel records" as defined by statute without the faculty member's written consent.

Dr. Kame'enui has nevertheless consented to the release of his email records. Dr. Kame'enui's records must be redacted to protect information that he does not have authority to release, such as student records and email addresses and the personnel records of other faculty members. The petition for disclosure is denied as moot as to Dr. Kame'enui's records, because the University has agreed to disclose them once they have been redacted.

Dr. Simmons has not agreed to the release of her records. The University is ordered to review the email records of Dr. Simmons to determine whether they are personnel records or records subject to some exception to the Public Records Law. *See* Records Order, May 29, 2001, Lewis; Public Records Order, January 3, 1990, Rydberg (describing faculty personnel records). If the University withholds a record from disclosure, the University must identify the basis for that decision. Because we have been unable to provide meaningful review of each record for purposes of this order, Ms. Davis may again petition the Attorney General under ORS 192.450 for review of decisions made by the University on particular records. *See* Public Records Order, January 8, 1996, Josewski/Risser.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS18622

cc: Randy Geller, University of Oregon