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March 31, 2005

Sandi Doughton
The Seattle Times
1120 John Street
P.O. Box 70
Seattle, WA 98111

Re: *Petition for Public Records Disclosure Order*:
Oregon State University Records

Dear Ms. Doughton:

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 March 24, 2005, asks the Attorney General to direct Oregon State University ("OSU") to make available the following records.

1. All Requests for Approval for Outside Employment filed by George Taylor for the past ten years.
2. OSU's responses to those requests.
3. Any memoranda submitted by Mr. Taylor during the same time period requesting approval for a "deeper involvement with commercial enterprises."
4. OSU's response to those memoranda.

For the reasons that follow, we respectfully 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. ORS 192.420. Any person denied the right to inspect or to receive a copy of a 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).

We spoke with Caroline Kerl, General Counsel for OSU, about your petition. Ms. Kerl told us that OSU has no records responsive to the third and fourth categories of records in your petition, *i.e.*, no memoranda from George Taylor regarding a "deeper involvement with

commercial enterprises" nor responses from OSU. Therefore, we deny your petition for these records as moot. With regard to the first and second categories of records in your petition, Ms. Kerl told us that OSU denied your request because Requests for Approval for Outside Employment submitted by Mr. Taylor, and OSU's responses thereto, are confidential and, as provided by ORS 351.065(5), do not qualify as "public records" for purposes of the Oregon Public Records Law.

ORS 351.065(5) states that any "personnel records" designated as confidential pursuant to rules of the Board of Higher Education are not public records under ORS 192.420. If Mr. Taylor's Requests for Approval for Outside Employment and OSU's responses constitute confidential personnel records under ORS 351.065(5), so that they do not qualify as "public records" for purposes of the Oregon Public Records Law, the Attorney General lacks jurisdiction to order their disclosure.

1. Requests for Approval for Outside Employment

ORS 351.065(6) defines "personnel records" as records containing information concerning a faculty member kept by a university, including "other personal records of individual persons." OAR 580-022-0065(1) defines "personal records" as including records containing information kept by the institution * * * concerning a faculty member and furnished by the faculty member or by others, including, but not limited to, information as to * * * professional activities external to the institution * * *." OAR 580-022-0090(1) sets out the information about a faculty member that may be released. Information about external professional activities is not included. Subsection (2) of the same rule states that any information other than that listed in subsection (1) as being subject to disclosure "shall be considered personal and subject to restricted access as hereinafter set forth in OAR 580-022-0095 through 580-022-0125."

The Board of Higher Education adopted by rule standards governing both outside employment by its employees and potential conflicts of interest. OAR 580-021-0025.[1] The Board also adopted Oregon University System Internal Management Directive (IMD) 4.015, which sets out the process for university employees to report on outside employment. Subsection (1) of the IMD sets out three types of outside activities: (1) work by faculty related to their institutional responsibilities that takes approximately one day per week, (2) work unrelated to faculty institutional responsibilities performed on personal time and which is not covered by the IMD,[2] and (3) work that results in a potential conflict of interest as defined in ORS 244.020(14).

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[1] OAR 580-021-0025(2) states: "Institution employees shall provide written reports to their president regarding potential conflicts of interest as defined under ORS 244.020(8)." The statutory cite in the rule is incorrect ORS 244.020 has been amended since the rule was adopted in 1996. The citation should be to ORS 244.020(14). This requirement parallels the requirement in ORS 244.120(1)(c).

[2] As an example, a faculty member in biology who, on his one day per week, also worked as a movie critic, would be performing unrelated activities on personal time.

IMD 4.015(4) requires a faculty member to disclose and receive permission for engaging in any outside activities that relate to the faculty member's institutional responsibilities for which he or she receives compensation.[3] The administration of the institution then decides whether the outside activity poses a potential conflict of interest. OSU uses the Request for Approval of Outside Employment form for this purpose. *See also* OSU Policy on Outside Employment §1.2(4) ("All members of the faculty who wish to engage in outside consulting activities must complete the Request for Approval for Outside Employment form").

An outside activity constitutes a potential conflict of interest if it meets the criteria of ORS 244.020(14): an action, decision or recommendation of a public official, the effect of which could be to the private pecuniary benefit or detriment of the person. OAR 580-021-0025. *See also* OSU Policy on Outside Employment. ("For the purposes of this policy, conflict of interest is concerned with placing the financial interests of an outside organization or individual ahead of those of the University.") The OSU Policy on Outside Employment provides some examples of potential conflicts of interest. They include a faculty member who tries to influence an OSU decision which would benefit a company in which the faculty member has a financial interest or a faculty member transferring unpublished research to an entity from which the faculty member receives consulting fees.

OSU has chosen to require faculty to submit information about any outside employment so that OSU can independently determine whether there is a potential conflict of interest. Unless OSU determines that the outside activity creates a potential conflict of interest, all the information submitted by the faculty member is "part of a faculty member's confidential personnel record."[4] IMD 4.015(7).

Mr. Taylor submitted Requests for Approval for Outside Employment forms. Ms. Kerl has told us that, in all cases, OSU concluded there was no potential conflict of interest in his undertaking outside employment. Therefore, the forms became part of Mr. Taylor's personnel record. Specifically, they qualify as "personal records" under OAR 580-022-0065(1) which, because they are not subject to disclosure under OAR 580-022-0090(1), are subject only to restricted access under OAR 580-022-0095 through 580-022-0125. None of the cited rules permit disclosure of the petitioned records to members of the public.

As already noted, ORS 351.065(5) provides that any category of personnel records designated as confidential pursuant to Board of Higher Education rules are not "public records" under ORS 192.420. Because Mr. Taylor's Requests for Approval for Outside Employment are

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[3] ORS 351.067(1) permits the Board of Higher Education to authorize Oregon University System employees to receive outside compensation for consulting. This compensation constitutes official salary or honoraria for purpose of ORS 244.040(1)(a). ORS 351.067(3). *See also* Oregon University System Internal Management Directives (IMD) 4.011(4) ("Remuneration received in accordance with IMD 4.011 and IMD 4.015 from sources outside the University System shall be considered official salary, honorarium, or reimbursement of expenses for purposes of ORS 244.040.").

[4] ORS 351.067(3) states that, if authorization or receipt of compensation for an outside activity such as consulting creates a potential conflict of interest, the written report of the potential conflict pursuant to the rules of the Board of Higher Education is a public record subject to public inspection.

not "public records" under the Oregon Public Records Law, the Attorney General does not have jurisdiction to order their disclosure. For this reason, your petition for the first category of records is denied.

2. OSU's response to Mr. Taylor's Request for Approval for Outside Employment

You also petitioned for OSU's responses to Mr. Taylor's Requests for Approval for Outside Employment. Those records also qualify as "personal records" under OAR 580-022-0065(1) because they are records containing information kept by the institution concerning a faculty member's professional activities external to the institution. Likewise, the records are not subject to disclosure under OAR 580-022-0090(1), but are subject only to restricted access under OAR 580-022-0095 through 580-022-0125. Therefore, we deny your petition for these records because, pursuant to ORS 351.065(5), they do not constitute "public records" subject to disclosure under the Public Records Law.

For these reasons we deny your petition to compel disclosure.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

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c: Caroline Kerl, OSU General Counsel