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June 16, 2010

Ross Day
2007 State Street
Salem, OR 97301

Alan Smith, Records Officer
Public Employees Retirement System
11410 SW 68th Parkway
PO Box 23700
Tigard, OR 97281-3700

Re: Petition for Public Records Disclosure Order:
Public Employees Retirement System Records

Dear Mr. Day and Mr. Smith:

This letter is the Attorney General's order on Mr. Day's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192 505. In his petition, Mr. Day asks the Attorney General to direct the Public Employees Retirement System (PERS) to make available records concerning former Governor John A. Kitzhaber. In particular, he requests records confirming Governor Kitzhaber's membership in PERS and showing his effective date of retirement and the amount of his retirement benefit. For the reasons that follow, we grant Mr. Day's petition in part and deny it in part.

In a letter to Mr. Day dated May 20, 2010, PERS Records Officer Alan Smith told Mr. Day that Governor Kitzhaber is a member of PERS. Mr. Smith further offered to provide records confirming such membership upon payment of $18.00 in costs for obtaining, copying and determining whether portions of those records were exempt from disclosure. Mr. Smith informs us that Mr. Day did not respond to the offer to produce those records. Mr. Day's petition is denied with respect to his request for records confirming Governor Kitzhaber's membership in PERS, because PERS has provided such confirmation and is willing to document its statement upon receiving prepayment of its fees.

PERS denied Mr. Day's requests for records showing the effective date of Governor Kitzhaber's retirement and the amount of Governor Kitzhaber's retirement benefit. PERS stated that those records are exempt from disclosure under ORS 192.502(2). That provision conditionally exempts from disclosure

> Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

Two orders previously issued by this office conclude that public records generally are exempt from disclosure to the extent they show the amount of PERS benefits paid to a specific individual. Public Records Order, May 25, 2004, Schwend; Public Records Order, November 15, 2002, Jones & Voytko. In those orders, this office concluded that such benefit information is "sufficiently peculiar to private concerns to constitute information 'of a personal nature' for purposes of the personal privacy exemption." Schwend at 2, citing Jones & Voytko at 3.

To be exempt under ORS 192.502(2), the disclosure of the personal information in question must "constitute an unreasonable invasion of privacy." An invasion of privacy is unreasonable if "an ordinary reasonable person would deem [it] highly offensive." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) at 66, citing *Jordan v. MVD*, 308 Or 433, 442, 781 P2d 1203 (1989). In concluding that retirement benefit amounts paid to identified retirees are exempt from disclosure, the orders in Schwend and Jones & Voytko noted three considerations. First, disclosing a retirement benefit amount would disclose personal choices made by an individual that are not implicated by disclosure of other aspects of public employee compensation. Second, disclosure could subject a retiree choosing lump-sum payments to uninvited inquiries from persons promoting investments or other items. Finally, the orders found that "other provisions of Oregon law attest that an 'ordinary reasonable person' would deem disclosure by an employer of a former employee's retirement benefits 'highly offensive,'" citing ORS 192.550 to 192.595. Schwend at 2, citing Jones & Voytko at 3. Assuming that those orders were correctly decided, we find that Mr. Day's petition presents significantly different circumstances.

Mr. Day notes that Governor Kitzhaber is running for election as governor. A candidate for the State's highest office voluntarily forfeits a reasonable expectation of privacy around many aspects of personal life, including, to some extent, expectations of privacy concerning personal finances.

Indeed, as Mr. Day points out, ORS 244.050(1)(c) requires Governor Kitzhaber to file a statement of economic interest (SEI) with the Oregon Government Ethics Commission. Governor Kitzhaber has, in fact, filed such a statement. In that statement, Governor Kitzhaber discloses that PERS retirement income accounted for at least 10% of his household income in

2009, the year covered by the SEI he filed this year. Moreover, if Governor Kitzhaber's campaign is successful, he will be required to file another SEI next year disclosing his sources of income in 2010. Thus it is reasonably possible that next year's SEI will remove any doubt about whether Governor Kitzhaber is receiving ongoing PERS payments. Whether or not his campaign is successful, the fact that Governor Kitzhaber received PERS benefits in 2009 is known based on the SEI, which is publicly available. The question is whether disclosure of the amount of that benefit would be "highly offensive" to an ordinary reasonable person in Governor Kitzhaber's position.

We agree with Mr. Day's suggestion that Governor Kitzhaber's current gubernatorial candidacy, and the SEI filing that is required as a result, both undercut the position that disclosure of the requested information would constitute an unreasonable invasion of privacy. By choosing to run for governor, a candidate opens himself or herself to legitimate inquiries that might be unduly invasive if they targeted other retirees. We do not believe that an ordinary reasonable person in Governor Kitzhaber's position would be highly offended by the state's disclosure of the amount of the retirement benefit that PERS is currently paying them.

We also conclude that disclosing the effective date of Governor Kitzhaber's retirement is not an unreasonable invasion of privacy in the circumstances. We understand that a PERS member is not required to retire (in the sense of beginning to draw on PERS benefits) immediately upon becoming eligible for retirement. But the fact that Mr. Kitzhaber has retired is disclosed by his SEI. The only additional fact that would be apparent from disclosing the effective date of his retirement is the day itself. We do not think an ordinary reasonable person would regard that disclosure as "highly offensive."

Accordingly, we respectfully deny Mr. Day's petition insofar as he is seeking records confirming Governor Kitzhaber's PERS membership, because PERS has not denied Mr. Day's request for that information. We otherwise grant Mr. Day's petition. PERS has seven days within which to comply with our order or announce its intention to institute court proceedings. ORS 192.450(2). PERS may charge Mr. Day for the reasonable cost of its compliance.

Sincerely,

DAVID E. LEITH
Associate Attorney General

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