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May 20, 2010

SENT VIA EMAIL

Professor William T. Harbaugh
538 PLC
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(wtharbaugh@gmail.com)

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

Dear Professor Harbaugh:

On May 4, 2010, we received your petition seeking an order compelling the University of Oregon Foundation ("the Foundation") to disclose certain records to you. Specifically, you ask for copies of "gift letters" related to donations made to the Foundation that subsequently funded salary and bonus payments to former University of Oregon (UO) president Dave Frohnmayer.[1]

Oregon's Public Records Law, ORS 192.410 to 192.505, bestows upon "every person" the right to inspect the public records of any public body in this state, subject only to express exemptions. ORS 192.420. If a request is denied by a "state agency," the disappointed requester may petition the Attorney General to review the denial. ORS 192.450.

We conclude that the Foundation is not a "state agency" within the meaning of the Public Records Law. That term is statutorily defined for these purposes as "any state officer, department, board, commission or court ***created by the Constitution or statutes of this state***," (emphasis added) with exceptions not relevant. ORS 192.410(5). The Foundation is not created by the Constitution or statutes of the state of Oregon. Instead, the Foundation is a nonprofit corporation created by its articles of incorporation.

The Oregon Supreme Court has concluded that, under some circumstances, an ostensibly private entity can be subject to the requirements of the Public Records Law. *Marks v. McKenzie High School Fact Finding Team*, 319 Or 451 (1994). The court reached that conclusion after

[1] You graciously allowed us until May 20, 2010 to issue this order, and we thank you for that courtesy.

analyzing ambiguities in the definition of "public body." *Marks*, 319 Or at 457 (Nothing statutory text or context "sheds any light" on whether an entity of the kind at issue was a "public body" subject to the Public Records Law). We do not perceive any similar ambiguity with respect to requirement that a "state agency" be "created by the Constitution or statutes of this state."[2]

If we had jurisdiction in this matter – that is, if a "state agency" within the meaning of the Public Records Law were the subject of this petition – our office would appropriately analyze the factors articulated in *Marks* to determine whether *the state agency* could be compelled by our office to disclose the records of the Foundation. That is, the conclusion that a private entity is not a "state agency" under ORS 192.410(5) does not necessarily preclude the conclusion that the entity may functionally be an agent or department of a state agency for purposes of the Public Records Law. *See Laine v. City of Rockaway Beach*, 134 Or App 655 (1995) (City required to disclose records of an allegedly independent non-profit firefighting department because, based on the *Marks* factors, the firefighting department was "a functional agency or department of the city government" for purposes of the Public Records Law). Without some entity before us that is "created by the Constitution or statutes of this state," however, we lack jurisdiction to consider the issues raised by your petition. As a result, we must respectfully deny it.

Sincerely,

MARY H. WILLIAMS
for Deputy Attorney General

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[2] We have previously indicated that "the Attorney General has jurisdiction over petitions seeking the records of entities that are the functional equivalent of state agencies." Public Records Order, January 31, 2001, Hinkle at 2. In reaching that conclusion, we did not recognize that the *Marks* court's analysis was based on an ambiguity in the definition of "public body" set forth in ORS 192.410(3). Where the statutory definition of "state agency" plainly excludes an entity that is the subject of a petition, the scope of our jurisdiction under ORS 192.450(1) leaves no ambiguity for us to resolve using the *Marks* analysis.