JOHN R. KROGER
ATTORNEY GENERAL

MARY H. WILLIAMS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400

March 29, 2010

SENT VIA REGULAR MAIL & E-MAIL

John Packo and Pamela A. Mills-Packo
3439 NE Sandy Boulevard #225
Portland, OR 97232
Metisconsultingservices@gmail.com

Meg Reeves, General Counsel
Oregon State University – Office of the President
646 Kerr Administration Building
Corvallis, OR 97331-2128

Dear Mr. Packo, Ms. Mills-Packo, and Ms. Reeves:

This letter is the Attorney General's order on a petition filed by Mr. Packo and Ms. Mills-Packo (collectively "petitioners") seeking disclosure of records under the Oregon Public Records law, ORS 192.410 to 192.505. We received the petition on March 9, 2010. Petitioners subsequently granted an extension to allow us to more fully consider their petition. We now grant the petition, as we explain below.

Petitioners filed a public records request with Professor David Brauner of Oregon State University (OSU) for "all information" in Professor Brauner's possession regarding the Métis people,

> including but not limited to papers, presentations, proposals, field notes, photographs, maps, and other research results. Also please provide complete information on:
>
> A. Archaeological Sampling and Historical Analysis of the Robert Newell Farmstead
> B. Archaeological and Historical Evaluation of the ZigZag Cabin site
> C. Archaeological Assessment of the Barlow Road Tollgate Site
> D. Archaeological Assessment of the Fort Yamhill site

OSU denied the request on February 9, 2010. OSU's denial cited exemptions from disclosure under the Oregon Public Records Law, "including without limitation ORS 192.501(14)." That exemption applies to "[w]ritings prepared by or under the direction of faculty of public educational institutions, in connection with research, until publicly released, copyrighted or patented." OSU stated that it "has no non-exempt records responsive to" the request.

OSU informs us that it understands petitioners' request to broadly cover decades of faculty and student research, and thousands of pages of documents. That interpretation of the request appears to be consistent with the petitioner's description, which is quoted above. Precisely because of the breadth of the request, however, we are not persuaded that every document in OSU's possession is actually covered by an exemption from disclosure under the public records law. When a petition is filed with the Attorney General under ORS 192.450, "the burden is on the agency to sustain its action" except in a narrow set of circumstances that do not apply here. ORS 192.450(1).

We note in particular that the specific exemption cited by OSU expires under certain circumstances, including when faculty writings are "publicly released." We think it is very likely that the exemption has expired with respect to at least some of the research results that OSU understands are responsive to the request. And it is not apparent to us that other exemptions would apply to every record that is not exempt under ORS 192.501(14). Consequently, we cannot uphold OSU's denial of the request.

We do, however, think it is likely that some – perhaps many – of the requested records are exempt from disclosure. For example, the fact that the ORS 192.501(14) exemption is unlikely to apply to every faculty writing withheld does not mean that there are *no* records that are properly covered by the exemption. In addition, it seems likely that the requested records include at least some student records that may be exempt from disclosure under the Federal Educational Right to Privacy Act, incorporated into the Oregon Public Records Law by ORS 192.502(8). Other exemptions may also apply to some of the requested information.

Given that some, but not all, of the records are likely exempt from disclosure, we hereby order OSU to review its determination, and to provide petitioners with responsive records that are not subject to exemption. OSU must do so within seven days. ORS 192.450(2). In complying with this order, OSU may produce an estimate of the required fee and may require petitioners to prepay the estimated amount. See ORS 192.440. If such an estimate is generated, OSU's obligation to disclose the records will then be tolled until the estimate is paid.[1] In addition, OSU may determine that specific records are governed by specific exemptions from disclosure. If petitioners disagree with any such decisions made by OSU, petitioners are free to challenge OSU's determination in a subsequent petition.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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[1] Based on the nature of the request, it appears to us that the required fee will likely be substantial. It may be in the best interests of petitioners and OSU to reach agreement on a narrower request that imposes a lesser burden on OSU, and consequently requires a lesser fee. This order neither precludes nor requires such an agreement.