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March 19, 2010

Daniel Bonham, Executive Director
Fair Contracting Foundation
PO Box 9158
Portland, OR 97207

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

Dear Mr. Bonham:

On March 12, 2010, we received your petition, on behalf of the Fair Contracting Foundation of Oregon and Southwest Washington, seeking an order compelling the University of Oregon (hereafter "UO") to disclose certain records under Oregon's Public Records Law, ORS 192.410 to 192.505. Specifically, you are seeking certified payroll records relating to the Matthew Knight Arena Project (hereafter "arena project") for the months of January and February of 2010. For the reasons that follow, we respectfully deny your petition.

On February 11, you requested the certified payroll for January. The request was denied by UO on February 26, on the basis that UO did not yet possess the certified payroll records. On March 8, you requested the certified payroll for February. UO denied that request on March 10, again on the basis that UO did not have the records.

Your petition appears to assert two theories explaining why UO should be ordered to disclose the records. First, you assert that UO now possesses the certified payroll, at least from January. Second, you assert that Hoffman Construction Company (hereafter "Hoffman") had the requested records at the time of your requests, and that UO was required to obtain them from Hoffman in order to disclose to you. In support of this second theory, you cite ***Marks v. Mackenzie High School Fact Finding Team***, 319 Or 451, 878 P2d 417 (1994). In ***Marks***, the Oregon Supreme Court articulated principles relevant to determining when ostensibly private entities may be subject to the requirements of the Public Records Law.

You are correct that UO now possesses the certified payroll for January; UO informs us that Hoffman submitted those records on March 3, 2010. UO states that Hoffman has not yet

submitted the February certified payroll. UO's position is that you have never requested the records at a point when UO possessed them. UO points to language in the ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) (hereafter "MANUAL") in support of this position:

> A public body is required to make available for inspection and copying * * * only those records that exist at the time of the request. Persons seeking to inspect or to obtain copies of records of a public body on a continuing basis may be required to make a new request for records after the public body has responded to a request for records currently in the public body's possession.

MANUAL at A-1. UO further states that it was not aware that you still wanted the certified payroll records from these months. You had previously indicated that your need for the documents is time-sensitive, and despite the fact that UO had told you roughly when it expected to receive the certified payroll records, you did not subsequently renew your requests.

UO's position is correct. Assuming that UO did not have the records at the time it received and responded to your requests, UO could require you to make a new request before proceeding to make the certified payroll records available.[1]

We turn to your second contention, that UO is required to disclose certified payroll held by Hoffman. This is essentially an argument that UO effectively possessed the documents at the time it denied your requests. We cannot conclude that UO is the custodian of certified payroll that is held by Hoffman. Nor can we conclude that certified payroll in Hoffman's possession is subject to the Public Records Law under the Oregon Supreme Court's analysis in ***Marks***.

Our reasoning is straightforward. Contractors and subcontractors are required to submit certified payroll forms to public bodies. In relevant part, the arena project is governed by a contract signed by National Championship Properties (hereafter "NCP"), Hoffman, and, for limited purposes, UO. As a part of that contract (hereafter "arena contract"), Hoffman agrees that Hoffman and its subcontractors will submit certified payroll as required by ORS 279C.845. Arena contract, article 3.2.5. Submitting certified payroll is not an activity that Hoffman does *for* UO. Instead, it is Hoffman's private obligation, a duty Hoffman owes to the other contracting parties and must fulfill in order to receive full payment.[2] Nor is submitting certified

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[1] Legal requirements aside, a state agency and a requester seeking records that are received by the agency on an ongoing basis may find it mutually advantageous to make reasonable arrangements to facilitate the process.

[2] Your petition attached communications from the Bureau of Labor and Industries that suggested that Hoffman was collecting certified payroll on behalf of UO. We have reviewed the provisions governing certified payroll in the arena contract signed by Hoffman, National Championship Properties, and, for some purposes, UO. Under those provisions, Hoffman is not collecting the certified payroll on UO's behalf, but instead on behalf of Hoffman and Hoffman's subcontractors, for the purpose of providing it *to* JMI Sports LLC, the Authorized Representative under the contracts.

payroll a governmental function. Consequently, the principles articulated in ***Marks*** do not support the conclusion that certified payroll in Hoffman's possession is subject to disclosure.[3]

We also conclude that certified payroll that has not been submitted by Hoffman does not meet the definition of "public record" in ORS 192.410(4)(a). One element of that definition is that a record is "prepared, owned, used or retained by a public body." Before it is submitted, the payroll has not been prepared by UO, is not owned by UO, has not been used by UO, and is not maintained by UO. Indeed, ORS 279C.845(6) provides that "Certified statements ***received by*** a public agency are public records subject to the provisions of ORS 192.410 to 192.505" (emphasis added). Until they are submitted by Hoffman, we conclude that the certified payroll reports are not public records.

For the reasons just described, your petition is respectfully denied.

Sincerely,

DAVID E. LEITH
Associate Attorney General

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[3] The ***Marks*** opinion lists six factors that the court evaluated in considering whether an ostensibly private body might be subject to the Public Records Law: (1) the entity's origin; (2) the nature of work assigned to and performed by the entity; (3) authority granted to and exercised by the entity (4) government financial involvement with the entity; (5) government control over the entity's operation; and (6) whether the entity's officers and employees are government workers. 319 Or at 463-464. The court notes that this list is not exclusive. *Id.* In weighing the significance of those factors, the court was guided by the need to protect the principles underlying the Public Records Law. *Id.* at 468. When applied to Hoffman's role submitting certified payroll to UO, none of the factors articulated by the court weigh in favor of requiring disclosure. Moreover, because the records become public records in the hands of a public body, and because they must be submitted to a public body in order for a contractor to receive payment, we do not see why the principles underlying the public records law require certified payroll records to be treated as public records when they are in Hoffman's possession.