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Gordon Friedman
Statesman Journal
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David Crosley
Public Employees Retirement System
PO Box 23700
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Re: Petition for Public Records Disclosure Order
Public Employees Retirement System
DOJ File No.: 459001-GA0098-16

Dear Mr. Friedman and Mr. Crosley:

This letter is the Attorney General's order responding to Mr. Friedman's July 14, 2016, petition for a fee waiver under the Oregon Public Records Law, ORS 192.410 to 192.505. We thank Mr. Friedman for granting us an extension of time to issue this order. His petition asks the Attorney General to order the Public Employees Retirement System (PERS) to waive its $112.11 fee to produce its board members' and executive director's travel receipts since 2015.

We respectfully deny Mr. Friedman's petition so that PERS can reconsider its decision to deny his fee waiver request. PERS's decision was partly based on its belief that Oregon and federal law prohibit PERS from waiving fees because doing so would be an impermissible use of the Public Employees Retirement Fund (PERF); this belief stemmed from a Public Records Order from 2002 in which this office indicated that granting a waiver or reduction of fees pursuant to ORS 192.440(5) would constitute an impermissible diversion of PERF funds. Public Records Order, Aug 12, 2002, Bladine, at 2–3. For the below reasons, we now conclude that PERS is not prohibited from granting such a waiver or reduction when the Public Records Law requires it to do so.

The Oregon Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420(1). A public body may establish fees reasonably calculated to recover its actual cost in making public records available for inspection. ORS 192.440(4). The public body may waive or reduce its fee if doing so "is in the public interest because making the record available primarily benefits the general public." ORS 192.440(5). Even if waiving or reducing the fee is in the public interest, a public body has discretion whether or not to grant such a waiver or reduction. *In Defense of Animals v. OHSU*, 199 Or App 160, 189 (2005). But, examining the totality of the circumstances, "the public body's decision whether to grant or deny a fee waiver or reduction must be reasonable." *Id.* at 190. Thus, although a public body enjoys discretion with respect to whether to grant or deny fee waivers and reductions, that discretion is not unlimited. In some circumstances, waiver or reduction can be legally required.

Our 2002 order concluding that PERS may not waive or reduce costs as required by the Oregon Public Records Law contains essentially no analysis. It merely makes the conclusory statement that such waivers or reductions are not permissible because they do not "exclusively benefit" PERS members.

It is true that ORS 238.660(2) prohibits PERS from diverting PERF funds to "any use that is not for the exclusive benefit of members and their beneficiaries." The Internal Revenue Code likewise requires trusts such as PERS to make it "impossible . . . for any part of the corpus or income to be . . . used for, or diverted to, purposes other than for the exclusive benefit of [its] employees or their beneficiaries." 26 USC § 401(a)(2). And it is also true that PERF funds can only be used for the purposes set forth in PERS's statutes. ORS 238.660(1).

But these limitations have not been understood to prevent PERS from expending funds to comply with other laws that apply to PERS on the same terms that they apply to other public bodies[1], and that do not prevent PERS from prudently investing PERF or complying with its other fiduciary duties. For example, it has never been suggested that PERS cannot pay appropriate overtime, pay for reasonable accommodations for employees and members of the public with disabilities, pay the wages Oregon's prevailing wage law requires for certain construction projects, or pay expenses associated with collective bargaining. All of these activities are required by Oregon law (and some are also required by federal law). All of the relevant laws impose costs that are not intrinsically required in order for PERS to fulfill its mission. And all of them clearly benefit individuals other than PERS beneficiaries. Yet the fee

[1] Throughout this order we describe such laws as "laws of general applicability" or words to that effect. *See Boyle v. Anderson*, 68 F3d 1093, 1101 (8th Cir 1995) ("A law of general applicability is one that does not treat ERISA plans differently from non-ERISA plans."). This is intended to distinguish between laws that apply to PERS on the same terms as they apply to other agencies, and laws that specifically target PERS or PERF. This distinction is important because there are certainly cases describing significant restrictions on laws that *specifically target* PERS funds (and other dedicated funds). The fee waiver and reduction requirement of the Oregon Public Records Law does not specifically target dedicated funds.

waiver and reduction requirement of the Oregon Public Records Law appears to be the only generally applicable law this office has said PERS cannot obey.

We see no substantive justification for this unique treatment. Records—like employees—are intrinsically necessary in order for PERS to fulfill its mission. Public disclosure of those records, on the other hand, is not intrinsically necessary in order for PERS to fulfill its mission. But neither is paying overtime, providing reasonable accommodations to specific employees, engaging in collective bargaining with employees, or paying a prevailing wage. And while disclosure undoubtedly benefits individuals who are not the PERS beneficiaries, so do all of the other examples we are discussing. Failure to comply with any of these laws can result in potentially significant costs to PERS and corresponding losses to PERF, which would be detrimental—not beneficial—to PERS members. The Oregon Public Records Law is no different in this regard. *See* ORS 192.490(3) (providing that public records requesters who prevail in actions to compel disclosure of records are entitled to reasonable attorney fees). We do not believe that the "exclusive benefit" rule requires (or authorizes) PERS to refuse to comply with valid laws that apply to it on the same terms as other public bodies.

Indeed, at least one state court has rejected arguments that the exclusive benefit rule permits a retirement system to charge a party for a records request when state public records law did not authorize the charges. *State Employees' Retirement System v. Office of Open Records*, 10 A3d 358, 363 (Pa Commw Ct 2010). We have been unable to find any IRS decisions analyzing the specific issue.[2] But we also have been unable to find any IRS guidance even suggesting that expenditures made to comply with generally applicable laws are not permitted under 26 USC § 401(a)(2).

Because of this lack of IRS guidance, we turn to cases interpreting ERISA's similar exclusive benefit rule, 29 USC §§ 1103(c)(1), 1104(a)(1). *E.g.*, *Westchester Plastic Surgical Assocs. v. Comm'r*, 78 Tax Court Memo (CCH) 756, at *6 (1999) ("[T]he standard for fiduciary behavior set forth in [ERISA] may be used to help determine whether the [IRS's] exclusive benefit rule has been violated.")[3].

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[2] Analyses of the exclusive benefit rule instead focus on whether the plan is prudently investing the funds for the benefit of the beneficiaries as a whole, as opposed to using the funds to benefit specific beneficiaries, trustees, or the employer. *See, e.g.*, *Ada Orthopedic, Inc. v. Comm'r*, 68 Tax Court Memo (CCH) 1392, at *6–7 (1994) (finding a violation of the rule where the plan made unsecured, risky loans to the trustees, their friends and families, and various plan participants, and didn't pursue delinquent loan repayments).

[3] Cases analyzing the Internal Revenue Code's exclusive benefit rule, and by extension ERISA's exclusive benefit rule, are relevant in interpreting PERS's statutes because "[i]t is the intent of the Legislative Assembly that [PERS] be qualified and maintained under sections 401(a) . . . of the Internal Revenue Code as a tax-qualified defined benefit governmental plan." ORS 238.600(1).

Those ERISA cases confirm our understanding that laws of general application that do not affect PERS's ability to prudently invest PERF funds, or otherwise affect PERS's fiduciary duties, do not violate the exclusive benefit rule. For example, in *Boyle v. Anderson*, the Eighth Circuit Court of Appeals rejected the benefit plans' argument that a provider tax benefitting low-income uninsured Minnesotans by increasing the plans' costs violated the exclusive benefit rule. 68 F3d 1093, 1102 (8th Cir 1995) (holding that ERISA did not preempt the provider tax). The court observed that the plans' argument "would mean that every state law that led to increases in plan costs—such as sales tax, minimum wage or environmental regulation statutes—would be preempted." *Id.* at 1103. The fact that the provider tax was a law of general applicability, which did not treat ERISA plans differently from non-ERISA plans, was also important to the analysis. *Id.* at 1101.

The Third Circuit reached the same conclusion with respect to a New Jersey hospital surcharge that benefitted the indigent and Medicare recipients but increased benefit plans' costs: "There are many forms of state regulation under the police power which results in increases in the cost of doing business and corresponding increases in prices where the beneficiaries of the regulation are not those who are paying the increased prices." *United Wire, Metal & Mach. Health & Welfare Fund v. Morristown Mem'l Hosp.*, 995 F2d 1179, 1196 (3d Cir 1993). The court rejected the benefit plans' argument that their fiduciary duty to act only for the benefit of beneficiaries prohibited them from paying prices that included the cost of care to others. *Id.* at 1195–96. The court also distinguished laws of general application that function without regard to the existence of ERISA plans from laws that single out ERISA plans for special treatment. *Id.* at 1192.

The *United Wire* court further analogized the hospital surcharge's effect on a benefit plan's cost of doing business to "'State labor laws that govern working conditions and labor costs, to rent control laws that determine what employee benefit plans pay or receive for rental property, and even to such minor costs as the [highway], bridge and tunnel tolls that are charged to plans' officers or employees.'" *Id.* at 1194 (quoting *Rebaldo v. Cuomo*, 749 F2d 133, 138–39 (2d Cir 1984)). "'In short, if ERISA is held to invalidate every State action that may increase the cost of operating employee benefit plans, those plans will be permitted a charmed existence that never was intended by Congress. Where, as here, a State statute of general application does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated.'" 995 F2d at 1194 (quoting *Rebaldo*, 749 F2d at 138–39).

Similarly, the Ninth Circuit rejected a benefit plan's argument that California's antidiscrimination laws violated ERISA by increasing the plan's cost of doing business. *Lane v. Goren*, 743 F2d 1337, 1340 (9th Cir 1984). The court noted that "state laws and municipal ordinances regulating zoning, health, and safety increase the operational costs of ERISA trusts, but no one could seriously argue that they are preempted." *Id.* The court also found that prohibiting employers from discriminating against employees on the basis of age, race, sex, or religion did not affect the plan's fiduciary responsibilities to plan members. *See id.*

The above cases are all analogous to the situation here: they dealt with laws of general application that increased a benefit plan's cost of operations in order to benefit others, but did not affect the plan's ability to prudently invest funds or comply with other fiduciary duties.

In addition to concluding that PERS's exclusive benefit rule is not violated here, we note that PERS is explicitly permitted to pay its administrative expenses from PERF interest. ORS 238.610(1)(a). For reasons explained above, the prudent administration of any program will generally include complying with valid generally applicable laws.

With respect to the Public Records Law specifically, we have noted above that PERS necessarily must create and maintain records as part of its work, and that the Oregon Public Records Law imposes requirements that are related to this necessary part of PERS's work. Moreover, the Oregon Supreme Court has explained the role that public access to government records plays in ensuring responsible administration of state government:

> Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants.

MacEwan v. Holm, 226 Or 27, 38 (1961). The same court expressed a similar sentiment in a subsequent case concluding that the Oregon Public Records Law could constitutionally require public disclosure of bar disciplinary files:

> To strike down the Public Records Law would give special treatment to attorneys and perhaps encourage public belief that a veil of secrecy is hiding professional misconduct. Opening up the files of the Bar to the public may restore confidence in the integrity of the individual attorney and assure those concerned that the profession is truly committed to maintaining the highest legal ethics.

Sadler v. Oregon State Bar, 275 Or 279, 295 (1976). In sum, the requirement to make public records publicly available—sometimes at reduced cost or no cost—appears to reflect a legislative judgment that transparency is a generally desirable attribute of government administration.

If we accept the view that transparency encourages honest, faithful and competent administration of government, as this office does, then PERS members in fact benefit from having PERS administered consistently with the Oregon Public Records Law. In theory, this very request could illustrate that benefit dramatically. If the travel receipts requested by Mr. Friedman were to reveal improper expenditure of PERF funds, then the disclosure of these records could well result (at a minimum) in the fund being restored—a benefit that could easily exceed the $112.11 in costs that PERS anticipates. Of course, we have no reason to believe that will be the case. It seems far more likely that the records will reveal no impropriety. But if it is true that transparency reduces the likelihood of misconduct in the administration of government

affairs, the mere fact that these records are readily available will contribute to securing that administrative benefit for PERS members.

We therefore reject the conclusion that PERS is statutorily prohibited from waiving or reducing public records fees as required by ORS 192.440(5) and (6). We conclude that expenditures to comply with that requirement are permissible administrative expenditures. Such expenditures are not substantively different from other expenditures PERS makes to comply with laws that apply to it on the same terms as other public bodies.

But that does not entirely end our analysis. PERS also denied Mr. Friedman's fee waiver request because "there is no clear and convincing argument that waiving the fee is in the public interest." PERS applied too strict a burden of proof here; neither the relevant statutes nor any decision by Oregon's appellate courts requires a requester to show by clear and convincing evidence that waiver will benefit the public interest.

Given that PERS relied on an order we are now overruling and applied the wrong burden of proof in assessing whether the public interest would justify waiving or reducing its fee, PERS should reconsider its decision to deny Mr. Friedman's fee waiver request. *See In Defense of* Animals, 199 Or App at 189 (public body to decide in the first instance whether public interest standard is met). In doing so, it should first determine whether disclosing these travel receipts would primarily benefit the general public: relevant factors include the requester's ability to disseminate information to the public, and how these particular records would better inform the public. *Attorney General's Public Records & Meetings Manual* 21–22 (2014).

If, as seems likely, PERS determines that waiver would primarily benefit the general public within the meaning of *In Defense of Animals*, it should next consider whether denying a fee waiver would be reasonable: relevant factors include 1) the character of the public interest in the particular disclosure; 2) the extent to which the fee impedes the public interest; and 3) the extent to which waiver or reduction would burden the public body. *Attorney General's Manual* 23. Another relevant factor, specific to PERS, is whether disclosure would benefit its members or beneficiaries by, for example, allowing better monitoring of the spending of the PERS board and executive director.

For the above reasons, we remand the decision on fee waiver to PERS so that it can reconsider its denial under the principles articulated in this order. If PERS again determines that waiver is not required, Mr. Friedman may petition this office to review that decision.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM7626261
c: Stephanie Vaughn, PERS