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Via email and regular mail

RE: Petition for public records disclosure order
Cylvia Hayes records

Dear Mr. Hinkle and Mr. Boise:

This letter is the Attorney General's order in response to Mr. Hinkle's petition on behalf of the Oregonian. Mr. Hinkle asks our office to direct Cylvia Hayes to disclose records under the Oregon Public Records Law. Specifically, Mr. Hinkle asks that we order Ms. Hayes to disclose records requested by Oregonian reporter Nick Budnick.

> [C]opies of all emails concerning state business sent or received by any email address [Ms. Hayes has] used since Jan. 1, 2011, including but not limited to [three listed addresses].
>
> Specifically, * * * all emails [Ms. Hayes has] sent or received or been cc'd on that contain the acronym 'FLO' or phrase 'first lady,' since January 1, 2011 – regardless of where they are currently stored.

Mr. Hinkle has subsequently clarified that his petition is seeking an order requiring disclosure only of emails that relate to the conduct of the public's business.[1] For the reasons that follow, we grant Mr. Hinkle's petition.

[1] Though at one point the request states that it is seeking "copies of all emails concerning state business sent or received," we think it is apparent from context that the Oregonian's position in making the request was that all emails containing the listed terms would constitute public records. For example, the request goes on to state "These are public records based on your public position, since you are both First Lady and an advisor to the governor's office[.]" This appears to be referring to all of the records specifically

The Oregon Public Records Law provides that "[e]very person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.420(1). The law is a disclosure law, and exemptions from its public disclosure requirement must be express. Even express exemptions are construed narrowly to further the public purposes served by disclosure. The narrow construction rule means that "if there is a plausible construction of a statute favoring disclosure of public records, that is the construction that prevails." *Colby v. Gunson*, 224 Or App 666, 676 (2008). A public body that asserts a statutory exemption from disclosure has the burden of demonstrating that the law permits the material in question to be withheld from public disclosure. ORS 192.450(1).

Before we discuss the substance of Mr. Hinkle's petition, we feel compelled to determine whether our office has authority to entertain this petition. ORS 192.480 provides that "[i]n any case in which a person is denied the right to inspect or to receive a copy of a public record in the custody of an elected official, or in the custody of any other person but as to which an elected official claims the right to withhold disclosure, no petition to require disclosure may be filed with the Attorney General or district attorney, or if a petition is filed it shall not be considered by the Attorney General or district attorney after a claim of right to withhold disclosure by an elected official." In light of the close relationship between Ms. Hayes and the governor, and the role that Ms. Hayes has, at least until recently, played in that office, there is some question about the applicability of this provision. We are aware, however, that despite those relationships, the governor's office has stated that it is not in possession of these records. And the governor's office has not asserted the right to withhold these records that are in the possession of Ms. Hayes. Consequently, we conclude that ORS 192.480 does not apply.

In opposing Mr. Hinkle's petition through counsel, Ms. Hayes does not assert otherwise. Instead, she offers four reasons why she believes the petition should be denied. First, Ms. Hayes argues that she is not a "public body" within the meaning of the Oregon Public Records Law. Second, she asserts that even if she were a public body within the meaning of the public records law, she is not a "public official" within the meaning of Oregon's governmental ethics laws.[2] Third, she argues that even assuming she is a public body, disclosure of the requested emails would be an unreasonable invasion of privacy and that the emails are consequently exempt from public disclosure pursuant to the personal privacy exemption of ORS 192.502(2). Finally, Ms. Hayes argues that the emails are exempt from disclosure pursuant to the exemption of ORS 192.501(1) for public records "pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur." Ms. Hayes supplements the arguments in her

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requested by Mr. Budnick. However, Mr. Hinkle's petition narrows the issue before us to records that contain information relating to the conduct of the public's business.

[2] The relevance of this second argument to the issue before this office is unclear. If, as the argument assumes, Ms. Hayes is a public body as defined by the Oregon Public Records Law, then she is subject to that law regardless of whether she is a public official for purposes of ethics statutes.

opposition by enclosing and incorporating arguments made in a memorandum submitted to the Oregon Government Ethics Commission.

Ms. Hayes is a "Public Body" for purposes of the Oregon Public Records Law.

We begin with the threshold issue whether Ms. Hayes is a "public body" within the meaning of the Oregon Public Records Law. The term is statutorily defined:

> "Public body" includes every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state.

ORS 192.410(3). Notably, the statutory definition explains what a public body "includes." It is not, or at least not expressly, exclusive. Indeed, Oregon's appellate courts have noted that the Public Records Law may apply to ostensibly private bodies, as we have previously explained:

> [I]n a 1994 case, the Oregon Supreme Court held that if the ostensibly private entity is the "functional equivalent" of a public body, the Public Records Law applies to it. The court stated that the following factors, although not exclusive, are relevant in determining whether a private entity is the functional equivalent of a public body:
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> - the entity's origin (was it created by government or was it created independently?);
> - the nature of the function(s) assigned and performed by the entity (are these functions traditionally performed by government or are they commonly performed by a private entity?);
> - the scope of the authority granted to and exercised by the entity (does it have the authority to make binding decisions or only to make recommendations to a public body?);
> - the nature and level of any governmental financial and nonfinancial support;
> - the scope of governmental control over the entity;
> - the status of the entity's officers and employees (are they public employees?).
>
> The court explained that no single factor was strictly necessary and no one factor would be determinative in all instances. In weighing the significance of the various factors, the court's focus was on whether the policies underlying the Public Records Law required that the private entity's records be available for inspection.

ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2014) (MANUAL) at 3-4. We have concluded, however, that the "functional equivalent" test is not necessarily an all-or-nothing proposition:

> Even if a private entity might meet this test, we have determined that not all of its records are necessarily subject to the public records law. Instead, we think it is appropriate to examine whether the entity possesses the requested records for purposes that are governmental in nature. For example, contracting with a large company to manage a significant government program might mean that the company's records pertaining to the managed program are public records. But it should not mean that all of the company's records are public records.

Id. at 4-5. Based on the preceding authorities, Ms. Hayes is a "public body" within the meaning of the Oregon Public Records Law either if she is a "state officer" or if the policies underlying the public records law require that at least some of her records be available for public inspection.

As Ms. Hayes notes in opposing the petition, the phrase "state officer" appearing in ORS 192.410(3) is not statutorily defined. Ms. Hayes further argues that "[i]n her unofficial capacity as First Lady, Ms. Hayes cannot be shoehorned into the term 'State Officer.'" The only support Ms. Hayes offers in direct support of this proposition is a footnote observing that she does not have an official email address from the state despite having requested one, because the Governor's office determined that she was not a state employee and was therefore ineligible for one. Ms. Hayes offers more developed arguments to support her view that she is not a "public official" for purposes of Oregon's ethics statutes. We do not believe that question is directly relevant to our inquiry, and do not purport to answer that question in this order. But we review these arguments offered by Ms. Hayes in the course of explaining why we conclude that Ms. Hayes is a public body under the Public Records Law.

Essentially, Ms. Hayes argues that "she (1) is not an elected official; (2) has not been appointed to any official position; (3) is not an employee of the State of Oregon and (4) is not an agent of the State of Oregon." We agree that Ms. Hayes is not an elected official, though of course other kinds of officials can be public bodies for purposes of the Oregon Public Records Law. We also agree that Ms. Hayes is not employed by the State of Oregon. But again, nothing in ORS 192.410(3) suggests that only people who are employed can be considered state officers. Indeed, many members of state boards and commissions are not employees of the state.

We turn to the assertions that Ms. Hayes "has not been appointed to any official position" and "is not an agent of the State of Oregon." These arguments are fleshed out in greater detail in the memorandum Ms. Hayes submitted to the Ethics Commission:

> [T]here is no office of the "First Lady" under Oregon law, so there is no government office to which she could be appointed. The Governor only has legal authority to appoint persons to fill statutorily created offices. In fact, there are 283

> categories of public offices or boards to which the Governor has legal authority to appoint persons. (See 2013 Oregon Revised Statutes, Vol. 19, General Index, Governor, Appointments). Notably, in that long statutory list of offices and boards, there is no "office of the First Lady."
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> * * * *
>
> Ms. Hayes, as a result of her personal relationship with Governor Kitzhaber, did not perform "governmental functions" or "services on behalf of the government." She was never a part of state government. She certainly gave the governor her thoughts and opinions on certain matters on which he conferred with her, as often occurs with spouses, friends, and supporters of other elected officials. However, providing thoughts and opinions to elected officials does not make any of those advisors part of "governmental functions." The elected official is obviously free to do whatever he or she deems appropriate with respect to such thoughts or opinions, including ignoring them."

Memorandum of Law Requesting Dismissal of Ms. Cylvia Hayes for Lack of Jurisdiction at 11-12 and 13 (quoting rules of the Oregon Government Ethics Commission).

For purposes of the application of the Oregon Public Records Law, we believe this argument proves far too much. The list of statutory positions to which the governor may appoint individuals similarly does not include (for example) numerous "Policy Advisor" and "Senior Policy Advisor" positions appearing in the governor's office organization charts submitted as part of Ms. Hayes's opposition. These positions are not specifically created by Oregon's constitution or laws. Of course, the individuals in these positions are employed by the State of Oregon. But we do not believe that the individuals occupying those positions would cease to be subject to the Oregon Public Records Law if they were to end their employment relationship with the state while continuing in their duties, which would be the apparent consequence of accepting Ms. Hayes's limited view of what constitutes a "public body."

Indeed, the technical and categorical approach suggested by this argument is inconsistent with the approach adopted in the Oregon appellate decisions adopting the "functional equivalent" test for ostensibly private bodies. The Oregon Supreme Court has stated explicitly that this inquiry is to be a functional one:

> We believe that, for purposes of construing Oregon's operative term, the legislature would have intended this court to apply a "functional" approach similar to that taken by the federal courts and by the courts of many of our sister states (as detailed [earlier in the opinion]). Accordingly, we hold that the determination of whether a particular entity is a "public body" within the meaning

> of ORS 192.410(3) will depend on the character of that entity and the nature and attributes of that entity's relationship with government and governmental decision-making.

Marks v. McKenzie High School Fact-Finding Team, 319 Or 451, 463 (1994). The court went on to explain that policy considerations must ultimately inform that functional analysis:

> The policy of governmental openness that underlies the Inspection of Public Records Law rests on the premise that the public should have access to information on which governmental decisions are based. Cf. ORS 192.620 ("The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and *the information upon which such decisions were made.*") (emphasis supplied). In this case, because *defendant's operations were independent of government*, and because defendant did not have any authority to make decisions for the school board, *access to defendant's records was not necessary to serve the policy goals behind the Inspection of Public Records Law.*

Id. at 466 (emphasis added, except where emphasis supplied by the court is noted).

Perhaps recognizing the limits of her categorical arguments, Ms. Hayes also argues that application of the analysis employed in *Marks* leads to the conclusion that Ms. Hayes should not be subject to the Oregon Public Records Law. We respectfully disagree.

We begin our analysis with the six factors that the *Marks* court specifically considered. But we remain cognizant of the court's statements that these factors are not exclusive,[3] and that "no single factor is either indispensable or dispositive." *Id.* at 464.

The first factor discussed in *Marks* is "[t]he entity's origin (e.g., whether the entity was created by government or had some origin independent of government)." *Id.* In addressing this factor, Ms. Hayes's opposition to the petition focuses on the nature of the role of the "First Lady." She notes again that Oregon law establishes no formal role for such a position. But our analysis is not concerned with Ms. Hayes's title by itself, nor with her personal relationship with the governor. It is Ms. Hayes's role in government policy matters that we believe is relevant to assessing whether she should be considered a public body. Focusing on the origin of that relationship, we can only conclude that it arose through the decision of the governor to authorize, or at least allow, her to participate actively in the executive branch of government. For purposes of the *Marks* analysis, we believe that the "origin" of Ms. Hayes relevant relationship with the government was "created by government."

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[3] "The foregoing list is not intended to be exclusive. Any factor bearing on the character of the entity and the entity's relationship with government may be relevant in determining whether that entity is a "public body" subject to the Inspection of Public Records Law." *Marks*, 319 Or at 464, FN 9.

The second factor discussed in *Marks* is "[t]he nature of the function assigned to and performed by the entity (e.g., whether that function is one traditionally associated with government or is one commonly performed by private entities)." *Id.* As noted above, the governor's office employs numerous policy advisors and senior policy advisors who perform functions similar to the relevant functions performed by Ms. Hayes. Among other examples, records disclosed to the press demonstrate that Ms. Hayes has led the Oregon Prosperity Initiative, has done significant work toward Oregon's adoption of the "Genuine Progress Indicator" (GPI) as a measure of policy outcomes, regularly participated in high level executive branch meetings – media reports plausibly indicate "at least 475 meetings with state employees, senior governor's office staff and other state leaders"[4] – and directed state employees in their work. These types of functions are "traditionally associated with government" and are not "commonly performed by private entities.

The third factor discussed in *Marks* is "The scope of the authority granted to and exercised by the entity (e.g., does the entity have the authority to make binding governmental decisions, or is it limited to making nonbinding recommendations)." *Id.* Ms. Hayes emphasizes that "as in *Marks*, Ms. Hayes has never had actual or apparent authority to bind the State of Oregon to anything." The *Marks* court did find that, under the circumstances before it, the limited advisory authority of the entity under consideration was highly significant:

> For defendant's recommendations to have had any effect on the operation of McKenzie High School or on any other matter of public concern, the school board would have had to take independent action to implement those recommendations. That fact is most significant in this case, because the school board is itself an accountable public body whose records are subject to the Inspection of Public Records Law, ORS 192.410(3). As a result, plaintiffs would have been entitled to inspect any report and any other documents submitted to the board by defendant in connection with its investigation and recommendations (if any), thereby gaining access to any information that might contribute to any choice of actions that the body with actual power—the school board—might make.

319 Or at 465. But the facts before the court in *Marks* were markedly different than the facts in this case. In *Marks*, the advisory entity was given a one-time charge, and dealt with a single public body – a school board – to whom its recommendations were delivered. From disclosed public records, Ms. Hayes's involvement in high-level policy matters appears to have been far broader, and she appears to have had widespread interactions with various state agencies. In one widely reported example, Ms. Hayes interacted with Michael Jordan, head of the Department of Administrative Services and the state's "Chief Operating Officer" with regard to the state's work to adopt the GPI as a tool to measure policy outcomes. Our overall view is that state employees

[4] Laura Gunderson, "John Kitzhaber controversy: Though he promised answers in ethics review, governor quietly looking to shut down inquiry," available at http://www.oregonlive.com/politics/index.ssf/2015/02/john_kitzhaber_cylvia_hayes_et_1.html (accessed February 12, 2015).

interacting with Ms. Hayes regarded her as having authority in the governor's office at least roughly equivalent to the authority wielded by the governor's senior policy advisors. Although Ms. Hayes's authority may have been similar in nature to the advisory authority of the group at issue in *Marks*, the breadth of that authority strikes us as markedly different. So too does the extent to which the public employees with whom she interacted likely regarded her as an authority figure. Under the circumstances, we believe that the scope of authority apparently wielded by Ms. Hayes, even though that authority may have been advisory, weighs in favor of finding that she is a public body.

The fourth factor discussed in *Marks* is "[t]he nature and level of government financial involvement with the entity. (Financial support may include payment of the entity's members or fees as well as provision of facilities, supplies, and other nonmonetary support.)" *Id.* at 463-464. Ms. Hayes observes that "the state has reimbursed Ms. Hayes for certain expenses, but the state does not compensate or pay Ms. Hayes in any way[.]" We think that this factor weighs in favor of finding that she is a public body subject to the Oregon Public Records Law. Frankly, if the state has reimbursed Ms. Hayes for expenses not connected with the conduct of official business, the propriety of such reimbursements would seem questionable. And, as we alluded to above, many individuals who serve on state boards and commissions are in the same situation.

The fifth factor discussed in *Marks* is "The nature and scope of government control over the entity's operation." *Id.* at 464. And the sixth factor is "The status of the entity's officers and employees (e.g., whether the officers and employees are government officials or government employees)." Ms. Hayes attempts to address these factors by arguing that she "is not subject to anyone's supervision as First Lady of Oregon, and she is obviously not an employee or an officer of the state." Again, our order is not primarily interested in the personal relationship between Ms. Hayes and Governor Kitzhaber that underlies her moniker as "First Lady." Instead, we are focused on her role within the executive branch of Oregon state government. In opposing Mr. Hinkle's petition, Ms. Hayes does not address disclosed public records that indicate that, at least in some cases, Ms. Hayes appeared to wield a significant amount of authority over government employees. Under the circumstances, we believe that at least the second of these two factors also weighs in favor of concluding that Ms. Hayes should be considered a "public body" for purposes of the Oregon Public Records Law.

Consistent with the guidance of the Oregon Supreme Court, we ultimately view these factors as guideposts to assist us in arriving at an answer to the fundamental question whether "access to [Ms. Hayes's] records [is] necessary to serve the policy goals behind the Inspection of Public Records Law." In answering this question in the affirmative, we are in no way relying on the personal relationship between Ms. Hayes and Governor Kitzhaber. Nor are we relying on her title as "First Lady" by itself. We do not believe or suggest that such a relationship with a public official, even an elected governor, means that the Oregon Public Records Law is inherently applicable. Instead we are persuaded by Ms. Hayes's extensive, high-level involvement in the executive branch of Oregon's state government. In reaching this decision, we are mindful, even sympathetic, of Ms. Hayes's assertion that she "requested a state email address, but the

Governor's office determined that Ms. Hayes was ineligible because she was not a state employee." With the benefit of hindsight, assigning a state address to Ms. Hayes might have been a good idea given the eventual degree of her involvement in executive branch decision making. Indeed, from the fact of the request it appears that Ms. Hayes anticipated, more accurately than the office, the nature of the role that she would be performing. But the decision of the office to deny Ms. Hayes's request does not affect our ultimate determination that the policy goals behind the Oregon Public Records Law require public access to some of Ms. Hayes's emails.

Ms. Hayes's emails are "public records" if they "contain information relating to the conduct of the public's business."

Having reached that determination, the question becomes *which* of Ms. Hayes's emails does the Public Records Law require that the public have access to? The definition of "public record" in the Oregon Public Records Law provides a succinct answer:

> (a) "Public record" includes any writing that *contains information relating to the conduct of the public's business*, including but not limited to court records, mortgages, and deed records, prepared, owned, used or retained by a public body regardless of physical form or characteristics.
> (b) "Public record" *does not include any writing that does not relate to the conduct of the public's business and that is contained on a privately owned computer.*

ORS 192.410(4). From this statutory text, we conclude that Ms. Hayes's emails are "public records" under the law only to the extent that they "contain[] information relating to the conduct of the public's business[.]"

We do not believe that all of the records containing the terms requested by the Oregonian – the acronym FLO or phrase "first lady" – are necessarily public records. Those terms uniformly relate to Ms. Hayes's status as "First Lady." But it is not that status, by itself, that we believe makes her subject to the requirements of the Public Records Law. It is, rather, the role she played as a policy advisor within the executive branch of state government. We have no difficulty imagining that there may be emails containing those terms that are unrelated to the conduct of the public's business. For example, a hypothetical email to a friend simply expressing feelings about being the "First Lady" would not relate to the conduct of the public's business and would not be a public record, per ORS 192.410(4)(b). Thus, our conclusion that Ms. Hayes is a "public body" for purposes of the law means only that her emails *containing information relating to the conduct of the public business* are subject to the Oregon Public Records Law. To the extent that Mr. Hinkle's petition sought information unrelated to the conduct of the public's business, we would be compelled to deny disclosure of such records. However, Mr. Hinkle has now clarified that his petition only seeks the disclosure of records related to the public's business.

Just as we cannot conclude that all of the emails requested by the Oregonian fall within that category, we likewise cannot conclude on this record that *none* of the emails requested by the Oregonian relate to the conduct of the public business. It is clear that Ms. Hayes worked extensively on government matters, and did at least some of that work by email. And it is highly probable, for example, that Ms. Hayes communicated, with individuals inside and outside of government, about the adoption of the GPI. Because adoption of the GPI was a matter that Ms. Hayes worked on as the governor's policy advisor within the executive branch, such emails would relate to the conduct of the public's business regardless of whether she was communicating with government or non-government actors. The same analysis would apply to other matters on which Ms. Hayes worked as a policy advisor within state government. To the extent that Ms. Hayes's emails contain information relating to the conduct of the public's business, we conclude that they are public records and subject to disclosure unless they are expressly exempted from disclosure by ORS 192.501 or 192.502. ORS 192.420(1). We turn now to two exemption claims advanced by Ms. Hayes.[5]

To the extent that Ms. Hayes's emails relate to the conduct of the public business, we cannot conclude on this record that disclosing them would constitute an unreasonable invasion of privacy.

Given that only records relating to the conduct of public business are "public records," Ms. Hayes has not adequately shown that disclosing the emails will constitute an unreasonable invasion of her privacy. Ordinarily, the manner in which a public body conducts the public's business is not a private matter. ORS 192.450 provides that, in a petition before the Attorney General, the burden of showing that records are exempt from disclosure rests on the public body. The "personal privacy" exemption of ORS 192.502(2) provides that "[t]he party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy." But the Oregon Supreme Court has clarified that a public body asserting the exemption must make a threshold showing that disclosure would constitute an unreasonable invasion of privacy. *Jordan v. MVD*, 308 Or 433, 443 (1989). Ms. Hayes's broad arguments in this regard are insufficient to demonstrate a reasonable likelihood that disclosure of her emails containing the various phrases requested by the Oregonian *and containing information relating to the conduct of the public's* business would constitute an unreasonable invasion of her privacy.

The requested emails are not exempt from disclosure because they may become relevant to litigation.

Ms. Hayes also argues that the records are exempt from disclosure because they are likely to become relevant to litigation that Ms. Hayes expects will arise from proceedings currently pending before the Oregon Government Ethics Commission. ORS 192.501(1) exempts from

[5] We do not address Ms. Hayes's argument that, even if she is a "public body" for purposes of the Oregon Public Records Law, she is not a "public official" for purposes of the Oregon ethics statutes. See footnote 2, above.

public disclosure "Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur." Although Ms. Hayes's position may be an understandable one in light of the text of the statute, it is inconsistent with the manner in which the Oregon Court of Appeals has construed the exemption:

> [T]o further the statutory policy that government records be open to the public, we hold that, under ORS [192.501(1)], public records are exempt only when the records contain information compiled or acquired by the public body for use in ongoing litigation or, if a complaint has not been filed, if the public body shows that such litigation is "reasonably likely to occur." See generally 37 Or.Op. Att'y Gen. 1087, 1105 (1976). Here, no ongoing litigation was involved, and we agree with the court's conclusion that the requested records did not contain information compiled because "litigation (was) reasonably likely to occur."

Lane County School Dist. No. 4J v. Parks, 55 OrApp 416, 420 (1981). Succinctly, the exemption does not apply to records compiled in the ordinary course of business that may subsequently become relevant to litigation or likely litigation. Ms. Hayes makes no showing suggesting that these records were initially created for use in likely litigation. We consequently conclude that ORS 192.501(1) does not exempt the requested records from disclosure.

Order

For the foregoing reasons, Mr. Hinkle's petition is granted. Ms. Hayes has seven days within which to comply with this order or announce her intention to institute court proceedings. ORS 192.450(2).

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

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