THEODORE R. KULONGOSKI
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DEPARTMENT OF JUSTICE
1162 Court Street NE
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Salem, Oregon 97310
Telephone: (503) 378-4400
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February 8, 1995

Alan Pittman
Eugene Weekly
1251 Lincoln
Eugene, OR 97401

Re: ***Petition for Public Records, Disclosure Order and Review of Denial of Fee Waiver; University of Oregon Records***

Dear Mr. Pittman:

Enclosed is a corrected copy of the public records order mailed to you on February 6. While reviewing our files, we noticed that footnote 4 was omitted from the last page of the letter.

Sincerely,

JOAN LINN
Assistant to the Attorney General

JPL:jpl/JAA0167B.W51
Enclosure

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February 6, 1995

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Re: ***Petition for Public Records, Disclosure Order and Review of Denial of Fee Waiver; University of Oregon Records***

Dear Mr. Pittman:

This letter is the Attorney General's order on your petition for disclosure of records and denial of your request for a fee waiver, under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on January 17, 1995,[1/] asks the Attorney General to direct the University of Oregon (University) to make available for inspection public records relating to expenditures incurred during the football team's appearance at the Rose Bowl. Your petition also asks the Attorney General to order the University to waive its fees for making these public records available to you. For the reasons that follow, we respectfully deny your petition.

1. Disclosure of Public Records

The Public Records Law confers a right to access any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. The law requires that the custodian of public records furnish proper and reasonable opportunities for inspection and/or copying of the records in the office of the custodian. ORS 192.430. Any person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from public inspection. ORS 192.450(1).

Your petition states that you requested the right to inspect copies of public records relating to Rose Bowl expenditures made by the University. Additionally,

your petition states that your request to inspect these records was "denied" by Jan Oliver, Assistant Vice President for Institutional Affairs, who informed you by letter that in order to inspect these records, you would have to prepay the costs incurred by the University in collecting and assembling all responsive records.

According to Ms. Oliver, the University has now estimated the costs associated with responding to your request at $2,700. This cost represents 137 hours of labor by professional, managerial and classified staff.[2/] Because you may inspect the requested documents if you prepay the sum of $2,700, the University has not denied your request for disclosure of public records. *See, e.g.*, Public Records Order, July 21, 1992, Kell. Absent such a denial, the Attorney General has no jurisdiction to order disclosure. *See* ORS 192.450. Accordingly, we deny that portion of your petition seeking disclosure of public records as premature as you have not yet been denied a right to inspect any records.

2. Fee Waiver

ORS 192.440(3) provides that a public agency has the right to establish a fee schedule that will reimburse the agency for the actual costs associated in making records available, including costs for summarizing, compiling or tailoring such records. The Oregon State System of Higher Education, of which the University is a member, had adopted such a rule, which requires the prepayment of the costs associated with complying with a public records request. *See* OAR 580-01-020. The Public Records Law allows agencies to furnish copies "without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction is in the public interest because making the record available primarily benefits the general public." ORS 192.440(4). Your petition also asks the Attorney General to order the University to waive completely[3/] its fees for making the records available for inspection.

As previous public records orders have noted, ORS 192.440(5) does not require a fee waiver, but places the discretion to make this decision with the agency. *See, e.g.*, Public Records Order, November 10, 1994, Pittman; Public Records Order, May 19, 1993, Smith; Public Records Order, August 1, 1991, Larson. *See also* ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1993) (MANUAL) at 11.

We agree with your contention that a fee waiver is in the public interest in that, in general, it will always be in the public interest to know how state agencies spend public funds. However, in this time of budget austerity, the public also has an interest in obtaining reimbursement of its actual costs for providing records for inspection. *See* Public Record Order, Smith, *supra*, at 8.

The determination, therefore, becomes whether the University's denial of a complete fee waiver was "unreasonable." ORS 192.440(5). We have previously identified the criteria this office will apply in making the determination. *Id.* This criteria includes:

(1) the extent of time, expense and interference with the agency's business;

(2) the extent of the sheer volume of records requested;

(3) the segregation of exempt from non-exempt materials; and

(4) the extent to which an examination cannot meet the public interest or the particular needs of the requestor.

Id.

Applications of the first three of these criteria[4/] to the facts here indicate that the University's denial of a complete fee waiver is not unreasonable.

a. Time, Expense and Interference with University Business

The petition seeks a broad array of documents, including, for example, "Any and all receipts, accounting, budgets, memos, e-mail, letters, notes and other information relating to University expenditures surrounding this year's Rose Bowl." Given the breadth of this request, the University estimates that its response will require the involvement of at least ten separate offices/departments[5/] and up to 30 individuals for an estimated cost of $2700. This estimate does not include the time spend by the Office of the Vice President for Administration, nor does it include the time expended by the University gathering Rose Bowl expenditure information in the normal course of debriefing after participation in such an event. In addition, some

attorney time will be necessary to review the documents gathered to excise exempt from non-exempt records.

In an attempt to reduce the costs of your public records request, the University suggested that your narrow the scope of the request. You have declined to do. Consequently, compliance with this extremely broad request will be quite costly. Your request will entail substantial time and expense incurred by the University in responding to the records request and will negatively affect the University's ability to conduct its normal business activities.

b. Volume of Records Requested

It is difficult to estimate exactly how many records will be located that are responsive to this request. However, the University estimates that the volume of records will be quite large, at least several hundred pages. Moreover, because of the broad scope of the request, there is no assurance that the many of the records you wish to review will even contain information that you will disseminate to the public.

c. Segregation of Exempt from Non-Exempt Records

The University's files and documents relating to Rose Bowl expenditures contain a combination of records, some of which are or may be exempt from disclosure under the Public Records Law. Such documents include records constituting internal advisory communications and records containing legal advice, which are protected from disclosure under the doctrine of attorney-client privilege. *See* ORS 192.502(1) (internal advisory communication); ORS 192.502(8) (attorney-client privilege); *see also* MANUAL at 46-47.

This combination of both exempt and non-exempt documents within the requested records will require the University to segregate and excise all exempt material before allowing you to review the records. *See* ORS 192.505. As noted above, some legal advice will be necessary in performing this task.

Conclusion

The legislative history of ORS 192.440(4) indicates that agencies have a great deal of discretion in determining if a fee should be waived. *See* Public Records

Order, Smith, *supra,* at 5-6. Although there is a public interest in the subject of your request, the commercial interest that your newspaper has in this information and its ability to pay for the records are also factors to be considered. *Id.* at 6. Other factors particularly relevant to this request if the broad scope of the request, coupled with the uncertainty of how much of the information will actually be disseminated to the public. When these factors are weighed against the potential hardship the University would suffer if a complete fee waiver were granted, we conclude that the University's decision denying a complete fee waiver was not "unreasonable." *See, e.g.,* MANUAL at 11 (potential financial hardship on an agency arising from the granting of a complete fee waiver is relevant in determining the reasonableness of the agency's decision).

For these reasons, we respectfully deny your petition for a complete fee waiver.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel
to the Attorney General

EH:KMG:AV:tmt/JGG0B06E
Enclosure
c: Peter Swan (w/o encl)
Melinda Grier (w/o encl)

[1/] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

[2/] A breakdown of the University's costs estimated by department is enclosed.

[3/] Neither your inquiry to the University nor your petition to the Attorney General included a request for a fee reduction. Because that issue has not been presented to the University for their decision, we express no opinion on it.

[4/] Because you seek to inspect the public records requested, rather than to obtain copies of those records, the fourth criterion is inapplicable to our analysis.

[5/] These offices/departments include: the Public Affairs and Development Department; Merchandizing Department; Communications; Legislative and Community Relations; College of Arts and Sciences; School of Music; Athletic Department; President's Office; Alumni Association; and the Office of the Vice President for Administration.