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April 22, 1988

Peter Murphy
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Roger N. Edgington, Vice-President
for Finance and Administration
Portland State University
P.O. Box 751
Portland, Oregon 97207

Re: Request for Public Records Disclosure Order; Portland State University and University Foundation Records

Dear Mr. Murphy and Vice-President Edgington:

This letter responds to Mr. Murphy's petition for a public records disclosure order of the Attorney General. The petition, dated April 7, 1988, asks the Attorney General to order Portland State University ("the University") and its Vice-President for Development, Judith Nichols, to disclose:

"1. Acct. #60-2015, #50-1021, #90-864-3001

"2. [Portland State University] Foundation annual budget 1986-87, 1987-88"

University officials report that no formal annual Foundation budget for 1986-87 exists. We conclude, however, that the other records listed in the petition are public records that the University should make available for public inspection under the Public Records Law.

That Act, ORS 192.410 to 192.505, applies to "any public record of a public body in this state." ORS 192.420. The University and its officials are included within the Records Law definition of "public body." See ORS 192.410(1). A "public record" is defined by ORS 192.410(4) to include:

> " . . . any writing containing information relating to the conduct of the public's business, prepared, owned, used or retained by a public body regardless of its physical form or characteristics."

The records listed in Mr. Murphy's petition meet the two-pronged test of ORS 192.410(4).

A. The Foundation's Annual Budget for 1987-88

The Portland State University Foundation ("the Foundation") is a private, non-profit charitable corporation. It is not a public body for purposes of the Public Records Law. Nevertheless, its own operating policies provide:

> "An annual budget is prepared by the Vice President for Development of the University and approved by the University President. . . ." PSU Foundation Operating Policies, VII C.1. (9/23/87).

The 1987-88 Foundation budget thus is directly related to the activities of two state officers, performing functions in their official capacities as University Vice-President for Development and University President. Statutes such as the Public Records Law are based on the principle that the public has an interest "in knowing what the servants of government are doing." See MacEwan v. Holm, 226 Or 27, 45, 359 P2d 413 (1961). The official activities of preparing and approving an annual budget for the PSU Foundation are matters of the public's business.

Moreover, the literal terms of the above-quoted Foundation operating policy clearly demonstrate that the annual budget of the Foundation meets the disjunctive standards of the second prong of the public record definition, i.e., "prepared, owned, used, or retained by a public body." ORS 192.410(1). (Emphasis added.) Although the 1987-88 budget record may be "owned" by the Foundation, the budget was "prepared" by the University Vice-President for Development. The Foundation budget also was "used" by the University President when the President approved the budget. And it appears to us that the University Vice-President for Development has retained a copy of the Foundation's annual budget. In fact, on April 15, 1988, after the filing of Mr. Murphy's petition, the Vice-President

for Development sent a copy of the 1987-88 Foundation budget to Mr. Murphy. That record, albeit a budget of the Foundation, is a public record of the University for purposes of the Public Records Law.

B. The Statements of Account

A similar analysis leads us to conclude that the statements of accounts listed in the petition are subject to the Public Records Law. Although the Statement of Account No. 90-864-3001 purportedly relates to the "PSU Foundation," it is maintained as a "Portland State University General Ledger Statement of Account." It is a public record of a public body, and the Vice-President for Development already has written to Mr. Murphy to say that she will forward to him the information on Account No. 90-864-3001.

Regarding the Foundation accounts numbered 50-1021 and 60-2015, we find that the pertinent operating policy of the PSU Foundation provides that Foundation operating accounts, called "equities," may be established "by any University employee." (PSU Foundation Operating Policies, VII B, 9/23/87). The Foundation policy further states that "[e]xpenditures are authorized by the individual responsible for establishing the equity or department chair." Id. Thus, the account records of the Foundation relate to the activity of public officials, who in their official capacities as university employes or department chairs, establish Foundation operating accounts and authorize expenditures from those accounts. Such activities of public officials are public business.

The procedures established by the Foundation for monitoring operating accounts and for verifying expenditure authority also demonstrate that the Foundation operating accounts relate to the public's business. Foundation Policy VII B states:

> " . . . The equities are monitored by the Foundation accountant. Verification of authorization and of a balance to cover the expenditure is required before check is issued."

The monitoring and verification functions are performed by public employes in the course of their public employment.

Pursuant to an "Agreement to Provide Professional Services and Facilities in Exchange for Financial Support," approved on

September 14, 1984, the University agreed to assign specifically listed University employes to provide professional services to the Foundation on prorated full-time-equivalent (FTE) bases. The University also agreed to direct and supervise Iniversity and institution employes in producing specifically listed services to the Foundation. Under Exhibit A of the agreement, effective since September 3, 1986, a University employe was assigned to perform Foundation activities as the "Accountant," who "[p]rocesses receipts and disbursements of PSU Foundation funds and develops accounting reports." Under the terms of the exhibit to the agreement, the accountant devotes .80 FTE to Foundation activities, but is paid by the University on a full-time (1.0 FTE) basis. The accounts listed in the petition thus relate to the activities of a public employe performing Foundation work, for which she is paid with public funds.

We also note that, under the exhibit to the agreement, the "Accountant" was "ACCOUNTABLE TO EXECUTIVE DIRECTOR." The Executive Director of the Foundation is another public official whose role in the Foundation's accounting process demonstrates that the statements of accounts number 50-1021 and 60-2015 are records relating to the public's business.

The University Vice-President for Development is the Executive Director of the Foundation. Her role as Foundation Executive Director, however, is not distinguished from her role as Vice-President for Development. As noted above, the Foundation's Operating Procedure VII C.1. assigns budget preparation responsibility to her as the Vice-President for Development. With respect to the performance of Foundation functions by University employes, Exhibit A to University's agreement with the Foundation uses the term "Executive Director," but the exhibit does <u>not</u> list the Vice-President for Development among the university personnel assigned, on a pro-rated FTE basis, to Foundation activities. From these facts we infer that the Vice-President for Development performed Foundation Executive Director functions in her capacity as the Vice-President for Development.

This inference is buttressed by other documentation made available to us. The job description used by the University's Vice-President for Development Search Committee says that "[t]he Vice-President for Development will direct the PSU Foundation . . . and has overall responsibility for . . . the Portland State University Foundation." University organizational charts show that the Vice-President for

Development has line responsibility for the PSU Foundation, and that supervisory responsibility over the development officers, the alumni relations director, the university relations director and the Foundation's accountant was assigned to an officer designated as "VICE-PRESIDENT FOR DEVELOPMENT/EXECUTIVE DIRECTOR PSU FOUNDATION."

In sum, because the statements of accounts relate to the performance of supervisory accounting responsibilities by the Vice-President for Development, in that capacity, the statements of account relate to the public business.

Our conclusion on this point is not changed by information submitted to us on April 21, 1988. On that day, we received a copy of a February 9, 1988 memorandum from the University President to Vice-President Edgington. The memorandum states that "effective immediately" Vice-President Edgington would be responsible for the business and financial operations of the PSU Foundation. The University President directed that the university employe performing the functions of the accountant to the Foundation would report directly to Vice-President Edgington. The President also ordered Vice-President Edgington to work directly with the Foundation's Treasurer, in the Vice-President's "capacity as Assistant Treasurer"; to assume duties including, but not limited to, preparation and management of the budget, all financial transactions and reports and audits; and to work directly with the Foundation's auditors. The President's memo demonstrates that statements of accounts prepared after February 9, 1988, relate to the public's business in knowing what Vice-President Edgington has been doing for the Foundation in his official capacity as University Vice-President.

We also conclude that these statements of accounts were prepared, used or retained by a public body. The accounts were prepared by a University employe who was paid with public funds to perform an accountant's functions for the Foundation. The statements of accounts evidently were "used" by the Vice-President for Development in performing her state-paid work of supervising the accounts of the Foundation. In fact, she had access to the account records (located a short distance from her office in University space leased rent-free to the Foundation pursuant to agreement); and we reasonably may infer from the fact of access, that she used the account records. Although she reports that she had access to the records in her capacity as Executive Director of the Foundation, for the reasons set forth above, we are unable to distinguish her

actions in that capacity from the performance of her duties as a public officer, the University Vice-President for Development.

Moreover, the February 9, 1988 memo from the University President to Vice-President Edgington demonstrates that this Vice-President has access to the statements of account, and uses those accounts, in carrying out management responsibilities assigned to him in his capacity as University Vice-President.

The fact that two University Vice-Presidents either have or had access to the account records in undifferentiated public and private capacities also leads us to conclude that the Univeristy "retains" those records and, consequently, that University is a custodian of the records for purposes of the Public Records Law. The terms "retains" and "custodian" are not defined in the Public Records Law itself. Both terms commonly are understood to refer to the possession of some thing. "Retain" means "to hold or keep in possession." Webster's New Twentieth Century Dictionary Unabridged, 1545 (2d ed. 1970). "Custodian" means "a person who has care of something . . . a keeper." Id. at 449. We believe the most reasonable legal conclusion to be drawn from the facts outlined above is that the University, acting through officers performing official duties, has actual as well as constructive possession of the statements of Foundation accounts. With respect to those account statements, the University, as a custodian of those records, is required by ORS 192.430 to make the records available for inspection unless the records are exempt from disclosure under ORS 192.501 to 192.505.

The University does not claim that the account statement records are exempt from disclosure under the Public Records Law. Nor has the Foundation referred us to any of the exemptions outlined in ORS 192.501 to 192.505. The Foundation takes the position that the Statements of Account Nos. 60-2015 and 50-1021 are not public records, and therefore the Public Records Law does not apply at all.

We acknowledge that the Foundation is not a public body. But this fact does not compel the conclusion that Foundation records are not public records. Government files are filled with records originally prepared by private entities; but because government uses or retains those records for purposes such as registration, licensing, taxation, and the granting of public funds to private bodies, originally private documents may become public records subject to public inspection unless they are exempt from disclosure under the Public Records Law.

The Foundation asserts that the account statements are not public records because they are the property of the Foundation. We realize that private property does not become public property merely because it is placed in the hands of government officials. However, as noted above, the test for determining whether a record is a public record is cast in the disjunctive. Government need not own a record before that record can be deemed a public record. Government preparation, use or retention of a record pertaining to the public's business qualifies the record for treatment as a public record.

On this same point, the Foundation suggests that University disclosure of Foundation records may constitute the tortious conversion or misappropriation of Foundation property. We disagree. The evidence made available to us and the Foundation's attorneys shows that the University and the Foundation have entered into a mutually beneficial, bilateral agreement. When a private entity contracts with a public body it reasonably may expect that nonexempt records of the public body's activities under that arrangement will be subject to public inspection. As a contractual matter, we fail to see how public disclosure of such records necessarily destroys the benefit of the bargain for the private entity. As a matter of tort law or agency law, it appears to us that the University and the Foundation have joint control over records of the activities or functions which the University performs for the Foundation. The only distinction in custody is that the Public Records Law requires the University to disclose records that relate to its activities under its particular arrangement with the Foundation.

The Foundation cautions us not to rely on its Operating Policy VII B in analyzing Account Nos. 60-2015 and 50-1021. It advises that the policy does not accurately describe the procedures for the types of accounts in question, but the Foundation does not refer us to any other formally established charter provision, by-law, administrative policy, management directive, or the like which would authorize the establishment of, or activity within, Account Nos. 60-2015 and 50-1021. We are told that particular expenditures were authorized by persons who derive their authority from the Foundation's board, but the evidence available to us shows that those persons are public employes, or accountable to public employes acting in their official capacities.

Finally, the Foundation says that organizational charts and the job description that we discussed above do not change

the distinct existence of the Foundation, but "merely reflect the realities created by the contractual relationship between the Foundation and the University. . . ." But this last statement makes our point. Realistically, in pertinent Foundation matters, University officials operate simultaneously as public officials and officers of the Foundation. Their performance of their public roles meaningfully cannot be distinguished from their activities on behalf of the Foundation. Therefore, the public has a right to know what those public officials are doing for the Foundation, and nonexempt records of those activities must be made available for public inspection.

Conclusion

The existing documents listed in Mr. Murphy's petition are public records. The University has custody of those records. The University has not carried its burden to show that the records are exempt from disclosure under the Public Records Law. The petition for disclosure of the existing records is allowed.

The University Vice-President for Development has disclosed to petitioner a copy of the Foundation's annual budget for 1987-88, so we need not direct the University to disclose that record. The Vice-President for Development has assured petitioner that the University will disclose the Statement of Account No. 90-864-3001, but we direct the University to make that disclosure if it has not already made the record available for petitioner's inspection. We order Portland State University, its officials and employes to make Statements of Account Nos. 60-2015 and 50-1021 available for petitioner's inspection within seven days of the issuance of this order.

Respectfully submitted,

James E. Mountain Jr.

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Special Counsel to the
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JEM:cm
cc: Jerry Casby, Assistant Attorney General
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