

December 28, 2007

William T. Harbaugh
Department of Economics
1228 University of Oregon
Eugene, OR 97403

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

Dear Mr. Harbaugh:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on December 12, 2007,¹ asks the Attorney General to direct the University of Oregon (UO) to make available copies of any UO employment contracts for Vice Provost for Diversity Charles Martinez dating from June 1, 2007 to the present. You explained that you were seeking "documents referring to wages, salary, bonuses or other compensation current or deferred, as well as documents spelling out terms, duties and responsibilities of employment, including any discussion regarding teaching, grants, consulting, or other outside employment, but not limited to such matters." (Email message to UO General Counsel Melinda Grier, dated November 28, 2007). For the reasons that follow, we respectfully deny your petition.

A brief discussion of the evolution of this petition for a public records order will help with the analysis.

In response to your original request, which was made on November 28, 2007, UO provided you with copies of two employment contracts for Dr. Martinez, one for the period June 1, 2006, through June 30, 2007, and one for the period June 1, 2007, through June 30, 2008. On December 17, 2007, you asked Ms. Grier to confirm that the two documents sent were the only public records UO has that addressed your request. You emphasized that you are seeking

¹ Your petition was delivered in an email message sent Tuesday, December 11, 2007, at 8:00 PM. We did not receive the message until the next business day, Wednesday, December 12. We appreciate you extending the time in which to respond to December 28, 2007.

documents addressing Dr. Martinez's outside employment. (Email message to Ms. Grier, dated December 17, 2007).

In response to your clarification, Ms. Grier informs us that UO also possesses a request for approval for outside employment, including a supporting memorandum from Dr. Martinez that relates to the period May 13, 2007, to May 12, 2008, and a COI-C Approval Routing Sheet on this request. UO has refused to provide these documents to you.

In the meantime, you clarified your request for a public records order:

I hope you will encourage [Ms. Grier] to produce any documents that might conceivably touch on the issues raised in this request - e.g. emails, memos, or letters to or from Dr Martinez, or between UO administrators, regarding his over commitment [*sic*].

I think these would fall under the "discussion" part of "documents referring to wages, salary, bonuses or other compensation current or deferred, as well as documents spelling out terms, duties and responsibilities of employment, including any discussion regarding teaching, grants, consulting, or other outside employment[.]"

(Email to Christine Chute, dated December 23, 2007).

1. Employment contracts

Because UO already has provided you with copies of Dr. Martinez's two employment contracts for the period from June 1, 2006, through June 30, 2008, your request for an order requiring disclosure of these documents is moot. We therefore deny the request.

2. Request for Approval for Outside Employment

The Attorney General has determined in a similar case that the request of a faculty member for approval of outside employment and the response to that request are not public records. Public Records Order, March 31, 2005, Doughton at 3-4. The analysis here is similar.

Every person has a right to inspect any public record in Oregon, unless otherwise provided by law. ORS 192.420(1). The Board of Higher Education (Board) has the authority to designate by rule categories of personnel records as confidential. ORS 351.065(5).² Once

² ORS 351.065 provides in part:

(5) Any category of personnel records specifically designated as confidential pursuant to valid rules or orders pursuant to this section shall not be deemed a public record for the purposes of ORS 192.420.

(6) As used in this section, "personnel records" means records containing information kept by the institution, division or department concerning a faculty member and furnished by the

properly designated as confidential, the records so designated are no longer deemed public records. *Id.*

Personnel records that may be designated as confidential by rule are records “containing information concerning a faculty member and furnished by the faculty member or by others about the faculty member at the member’s or at the institution, division or department’s request, including, but not limited to, information concerning discipline, membership activity, employment performance or other personal records of individual persons.” ORS 351.065(6). OAR 580-022-0065(1) defines “personal records” as “including, but not limited to, information as to discipline, counseling, membership activity, other behavioral records, professional preparation and experience, professional performance (e.g., assignment and workload, quality of teaching, research and service to the institution), personnel data relating to such matters as promotions, tenure, leaves, retirement credits and the like and professional activities external to the institution, including, but not necessarily limited to, awards, recognition, research activities and travel.”

OAR 580-022-0090(1)³ sets out the information about a faculty member that may be released. Information about external professional activities is not included and is therefore subject to restricted access. OAR 580-022-0090(2).

faculty member or by others about the faculty member at the member’s or at the institution, division or department’s request, including, but not limited to, information concerning discipline, membership activity, employment performance or other personal records of individual persons.

³

OAR 580-022-0090 provides:

(1) Appropriate information about the faculty member may be released on request and without the faculty member's consent. Such information shall be limited to:

(a) Directory information, that is, information generally needed in identifying or locating a named faculty member including such information as is readily found in published documents such as institutional catalogs;

(b) Objective evidence of a faculty member's academic achievement, limited to information as to the number of credits earned toward a degree or in postdoctoral work, and certificate(s), diploma(s), license(s) and degree(s) received;

(c) Salary information and the record of terms or conditions of employment;

(d) Records tabulated from students' classroom survey evaluations, on a finding by the president that privacy rights in an adequate educational environment would not suffer by disclosure.

(2) All information in the faculty member's personal record file, apart from that identified in section (1) of this rule, shall be considered personal and subject to restricted access as hereinafter set forth in OAR 580-022-0095 through 580-022-0125.

The Board has adopted by rule standards governing both outside employment by its employees and potential conflicts of interest. OAR 580-021-0025.⁴ The Board also adopted Internal Management Directive (IMD) 4.015, which sets out the process for university employees to report on outside employment. Information that faculty must submit to comply with the policy on outside activities is part of the confidential personnel record of that faculty member, IMD 4.015(7), unless the receipt of compensation creates a potential conflict of interest. ORS 351.067(3) (record disclosing potential conflict of interest is subject to public inspection). UO has chosen to require faculty to submit information about outside employment in some cases, so that UO can evaluate whether proposed outside employment creates a potential conflict. University of Oregon Policy Statement, 3.095 Personnel Practices at IV, A.

Dr. Martinez submitted a Request for Approval of Outside Employment forms. Ms. Grier has told us that UO determined that Dr. Martinez had no potential conflict of interest in the proposed outside employment. Therefore, the forms became part of Dr. Martinez's confidential personnel record. As a result, these forms and the related COI-C Approval Routing Sheet are subject only to restricted access under OAR 580-022-0095 through -0125. None of the rules in that series permits release to you. *See* Public Records Order, March 31, 2005, Doughton at 4.

OAR 580-022-0095(1), which seems most closely applicable, provides that these records are available only to the faculty member involved and to representatives of the institution in their official capacity and those who "have a demonstrably legitimate need to review the records in order to fulfill their official, professional responsibilities as defined in institutional rules."⁵

⁴ OAR 580-021-0025 provides:

(1) No full-time employee of the Department or of any of the institutions or divisions shall engage in any outside employment that substantially interferes with duties. See also IMD 4.005 and 4.010, Board and Institution Policy on Outside Activities and Related Compensation.

(2) Institution employees shall provide written reports to their president regarding potential conflicts of interest as defined under ORS 244.020(8). Other Department employees shall provide the same reports to the Chancellor. Complaints by any person regarding potential conflicts of interest may be referred for investigation to the president, Chancellor or Director of Internal Audit who shall investigate the complaint.

⁵ OAR 580-022-0085 provides:

(1) Personal records designated as subject to restricted access in accordance with authority granted in ORS 351.065 shall be available only to the faculty member who is the subject of the records as provided for in OAR 580-022-0100 through 580-022-0115 and to institutional personnel, such as faculty, administrators, students and others serving on official institutional committees or in other official institutional capacities. Such institutional personnel shall have a demonstrably legitimate need to review the records in order to fulfill their official, professional responsibilities as defined in institutional rules. These records may not be released to any other person or agency without the faculty member's written consent, unless on receipt of a valid subpoena or other court order or process or as required by state statute, federal law or valid federal or state rules, regulations or orders.

These records may not be released to any other person or agency without the faculty member's written consent, unless on receipt of a valid subpoena or other court order or process or as required by law.

Therefore, we conclude that these records are confidential under the Board's rules and, as such, they are not "public records." ORS 351.065(5). Because they are not public records, the Attorney General has no authority to order them released. For this reason, we deny your petition to disclose these records.

3. Emails, memos, or letters to or from Dr. Martinez, or between UO administrators, regarding Dr. Martinez's alleged over-commitment.

Your November 28, 2007, request did not ask for records to or from Dr. Martinez or between administrators that related to what you have called Dr. Martinez's "over-commitment." Because you have not asked UO for these records, your petition for them is premature. *See* Public Records Order, September 17, 2007, James at 7 (petition seeking records that had not been sought from agency is premature). Some of the records you now seek, if they exist, may be subject to specific restrictions on the release of records, including the personnel records exception described above.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS21033
c: Melinda Grier

(2) Institutional rules shall provide for designation of institutional officials to appear in court to test the validity of a subpoena or other court order or process relating to release of faculty records when validity is in question.