

June 28, 2001

Leslie L. Zaitz
The Oregonian
1329 S.W. Broadway
Portland, OR 97201

Re: Public Records Petition

Dear Mr. Zaitz:

This letter is the Attorney General's order in response for your petition for public records under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on June 22, 2001, requests the Attorney General to order the Oregon Department of Education (ODE) to provide:

1. Access to the original notes taken by Deputy Superintendent Clark Brody at an interview conducted by The Oregonian of State Superintendent Stan Bunn on May 31, 2001.
2. Copy of all correspondence between ODE employees and the Government Standards and Practices Commission. The request specifically sought records concerning Stan Bunn, Kate Dickson and Joanne Flint.

For the reasons set forth below, we respectfully deny your petition.

Notes taken by Clark Brody

Under ORS 192.450, the Attorney General may order a state agency to disclose public records when that agency has denied any person the right to inspect or receive a copy of the records. The Attorney General does not have authority to order disclosure of public records until the agency has denied a request for those records. In responding to a public records request, an agency is permitted a reasonable opportunity to retrieve and review the requested records, and, if necessary, to consult with legal counsel before providing the records or denying the request. *Morse Bros., Inc. v. ODED*, 103 Or App 619, 622 (1990).

On June 11, 2001, you requested ODE to provide you with copies of an extensive list of documents, including any notes taken by Mr. Brody from meetings with Superintendent Bunn from March 9 through June 11, 2001. ODE complied with your request and provided you with copies of Mr. Brody's notes. Then on June 19, 2001, you requested ODE to allow you to inspect the original of Mr. Brody's notes. On June 22, 2001, you filed your petition with the Attorney General for disclosure of the original of these notes.

Dawn Billings, Director of the Curriculum Instruction and Field Services Division at ODE, informs us that ODE had not denied your request to inspect the original notes of Mr. Brody on June 22nd, but merely had not yet responded to that request.¹ Absent a denial of a records request by a state agency, the Attorney General cannot order the agency to disclose records.

Correspondence Between GSPC and ODE Employees

On June 19, 2001, you requested ODE to provide copies of all correspondence between the Oregon Government Standards and Practices Commission (GSPC) and ODE employees. Your petition to the Attorney General states that on June 22, the same date your petition was filed, ODE was requested "to explain its silence concerning this original request and the agency still has failed to notify petitioners in any matter as to the status of this request." Because ODE had not denied your request for these records at the time you filed your petition, we would normally deny your petition as premature. However, we understand that later that same day, ODE did deny your request for these records on the ground that the agency "does not have any documents of this description in its custody." Because ODE has now denied your request, we will consider your petition.

The 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. A "public record" includes:

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

ORS 192.410(4). A "public body" includes "every state officer, agency [and] department."
ORS 192.401(3).

Under these definitions, documents relating to the conduct of the public's business that are prepared, owned, used or retained by a state officer or agency are public records that are subject to disclosure under the Public Records Law. This does not mean that all documents in the hands of a public officer or agency employee are public records. Documents that are

¹ Ms. Billings informs us that ODE has since made arrangements with you to inspect Mr. Brody's notes, which you confirmed in your letter to this office dated June 25, 2001.

unrelated to the individual's duties in conducting the public's business are not public records. In responding to your petition, we consider whether correspondence between the GSPC and an ODE officer or employee would constitute a record that is prepared, owned used or retained by ODE or by an ODE officer or employee as a part of his or her conduct of the public's business.²

The GSPC has a broad range of responsibilities that include the collection and maintenance of various reports that must be filed by certain public officials.³ These include statements of economic interest, reports on association with a compensated lobbyist, disclosure of certain gifts received by state officials and reports of potential or actual conflicts of interest. Such reports are on file with the GSPC and are available as public records. We assume that your request for correspondence between GSPC and ODE employees does not include copies of such reports. Ms. Billings informs us that if that is not the case, ODE will provide to you copies of any such reports that are in ODE's custody.

In addition to the above functions, GSPC is authorized to conduct investigations, make findings and impose sanctions against public officials who violate a statutory code of ethics under ORS 244.040 and other provisions of ORS chapter 244.. The code of ethics is aimed generally at preventing public officials from using their official positions to obtain private pecuniary benefit. ORS 244.260 authorizes GSPC to conduct a preliminary review and an investigation of public officials suspected of violating the code of ethics or other provisions of ORS chapter 244. GSPC may also conduct hearings, make findings and impose sanctions or civil penalties against any public official who violates those statutes.

The liability of a public official in a GSPC proceeding is personal. *See* ORS 244.270 (removal from office), ORS 244.360 (forfeiture of gain), ORS 244.350, 244.370 (civil penalties). The public official has the right to be represented by private counsel in GSPC proceedings, but a state public official may not be represented by the Attorney General. ORS 244.250(8).

Correspondence between GSPC and a public official concerning a GSPC proceeding would be a public record when those records are in the custody of the GSPC.⁴ However, we do not believe that such correspondence is necessarily a public record in the hands of the public official who is the subject of the proceeding. For example, a state employee may prepare a resume and job description for purposes of seeking other employment. These documents may contain information that relates to the conduct of the public's business. Assuming the employee prepared those documents on the employee's own time and without using state resources, they

² Because your records request and petition seek records of ODE, we consider the documents in the hands of that agency and its officers and employees and not GSPC.

³ A "public official" is defined for purposes of ORS chapter 244 as "any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services." ORS 244.020(15).

⁴ Certain public records of GSPC are confidential and therefore exempt from disclosure under the Public Records Law. *See, e.g.*, ORS 244.260(6)(b).

would not be prepared or held by the employee as a part of the employee's responsibilities or conduct as a public official.

Similarly, a state employee may receive a letter from the Department of Revenue seeking an explanation of job-related tax deductions claimed by the employee on his or her tax return. Such correspondence may relate to activities undertaken by the employee in the conduct of the public's business, but it would not be held by the employee as a public record subject to disclosure because the employee would not have received, retained or used the document in the employee's capacity as a public official. And if the employee responds by letter to the Department of Revenue, that letter would not be prepared, owned or used by the employee as a part of the employee's employment activities.

Because GSPC proceedings pertain to a public officials in his or her individual capacity, and the official is personally liable for any sanctions that may be imposed, any correspondence between that individual and GSPC about the alleged violations is not a public record of the state agency for which that individual worked even though he or she may be alleged to have violated ORS chapter 244 when serving the State of Oregon as an officer or employee for that agency. Ms. Billings has confirmed that no ODE officer or employee has corresponded with GSPC using ODE stationery or resources. Thus, any correspondence between GSPC and an ODE officer or employee who is the subject of a GSPC proceeding about whether that individual's conduct violated ORS chapter 244 would be prepared, owned, used or retained by the employee in his or her private capacity and not as a public record of ODE. Accordingly, such correspondence is not subject to disclosure under the Public Records Law.

Other correspondence between GSPC and ODE officers or employees may be a public record. For example, GSPC could seek information from ODE related to an investigation of an ODE employee, or GSPC could seek information from ODE related to an investigation of another public official with whom ODE has conducted business but who does not work for ODE. In either case, ODE could respond to GSPC. Ms. Billings informs us that ODE does not have any correspondence of this type.

Based on the foregoing, we respectfully deny your petition.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General