



ROD UNDERHILL, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

September 29, 2015

Richard Read
The Oregonian
1500 S.W. First Ave., Suite 400
Portland, OR 97201

James Mountain
Harrang Long Gary Rudnick PC
1001 S.W. Fifth Ave., 16th Floor
Portland, OR 97204

Re: Petition of Richard Read for The Oregonian seeking a prospect evaluation report from the Portland State University Foundation regarding John Fitzpatrick

Dear Mr. Read and Mr. Mountain:

In his public records petition under ORS 192.410 et seq., petitioner Richard Read, requests the district attorney to order the Portland State University Foundation (the Foundation) to provide the following records:

A prospect evaluation report related to John Fitzpatrick and/or anonymous donor dated August 4, 2015 and prepared by Stacy Schoo.

The Foundation is a 501(c)(3) non-profit organization whose stated mission is “to support Portland State University’s mission to be a leading public university.” Following the lead of many institutions around the country Portland State University (PSU) has taken steps to separate its efforts to cultivate and maintain donor relationships from the day-to-day operation of the university. To this end, in July of 2014, PSU transferred its University Advancement and Alumni Relations offices, and all their employees, to the Foundation. The exact details of this transfer are not relevant to our resolution of this petition.

The Foundation maintains close ties to PSU: it operates out of a PSU owned building, for which it pays token rent; Foundation staff have PSU email addresses; it receives money from PSU as compensation for fundraising activities conducted on behalf of PSU; and PSU’s president sits on the Foundation’s board as an *ex officio* member. The Foundation has, however, taken steps to define its independence from PSU: the Foundation has an independent board; Foundation employees are not public employees; the Foundation has no authority to set policy for PSU; and, apart from a single seat on its board, PSU has no direct authority to control the Foundation’s operations.

In August of this year an individual approached PSU and made a \$100 million pledge to the university. During the process of working up to publicizing this extraordinary gift, the pledge evaporated prior to any formal announcement. Petitioner has written a series of articles,

published in The Oregonian, relating to this event including information about PSU's preparations to announce the gift and the identity and background of the donor. Petitioner now seeks an internal memorandum prepared by Foundation staff during this process.

Pursuant to ORS 192.470(2) the Foundation has submitted, and this office has reviewed, the memorandum that petitioner seeks.

DISCUSSION

A. Is the Portland State University Foundation the "functional equivalent" of a government agency?

Oregon's Public Records Law applies to public agencies and their "functional equivalents." *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451 (1994) (setting out criteria for assessing functional equivalency). The parties present compelling arguments as to whether or not the Foundation is the functional equivalent of a public agency. Its status has not previously been determined under Oregon law, and factors weigh on each side of the issue. This question would be well served by judicial or legislative clarification, as has occurred in many other states.¹ We need not, however, resolve this dispute today. We will assume, without deciding, that the Public Records Law applies to the Foundation.

B. ORS 192.501(24) & (25) – Oregon university system donor records

ORS 192.501(24) conditionally exempts from disclosure:

Personal information held by or under the direction of officials of [...] a public university listed in ORS 352.002² [...] about a person who has or who is interested in donating money or property to [...] a public university, if the information is related to the family of the person, personal assets of the person or is incidental information not related to the donation.

ORS 192.501(25) conditionally exempts from disclosure:

The home address, professional address and telephone number of a person who has or who is interested in donating money or property to [...] a public university listed in ORS 352.002.

If the Foundation is the functional equivalent of a public agency under *Marks* then it is the functional equivalent of PSU. Accordingly, any public records exemption applicable to PSU would likewise apply to the Foundation.

¹ Eleven states have determined that university foundations are subject to the local public records law (Alabama, California, Florida, Iowa, Kentucky, Michigan, Nevada, Ohio, Pennsylvania, South Carolina, Tennessee). Nine states have decided that they are not (Colorado, Connecticut, Georgia, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, West Virginia). See, Alexa Capeloto, *Private Status, Public Ties: University Foundations and Freedom of Information Laws*, 33 QUINNIPIAC L. REV. 339 (2015).

² ORS 352.002 expressly includes PSU as a "public university."

It appears that after this particular donor expressed an interest in donating money to PSU, the Foundation began doing background research on the donor to confirm his ability to fund his pledge. The memorandum at issue here documents the results of that research and appears to cover exactly the type of information the legislature intended to exempt from disclosure when it enacted ORS 192.501(24).

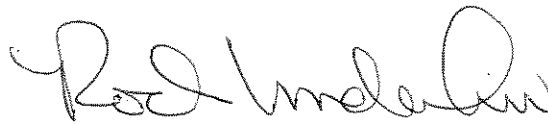
We decline petitioner's invitation to speculate on the exact subjective intent of the individual involved as a necessary precondition for applying 192.501(24). While the individual at issue here may never have had the means to fulfill a \$100 million pledge, we have no ability to determine whether he was truly interested in giving money (of any amount) or was seeking attention for other reasons. It suffices for these purposes that he expressed an interest in giving money, which then started the machinery of record generation that ORS 192.501(24) expressly exempts from disclosure.

Due to the amount of information about this incident already uncovered, and published, by petitioner as well as the specific contents of the document at issue, we cannot say that the public interest in access to this particular memorandum outweighs the general public interest in donor privacy at public universities.

ORDER

Accordingly, the petition is denied.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is fluid and cursive, with a large initial "R" and "U".

ROD UNDERHILL
District Attorney
Multnomah County, Oregon