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December 1, 2010

Dennis Thompson Jr.
Statesman Journal
P.O. Box 13009
Salem, OR 97309

David Crosley
Communication Officer
Public Employees Retirement System
PO Box 23700
Tigard, OR 97281-3700

Re: Public Records Disclosure Order
Public Employees Retirement System

Dear Mr. Thompson and Mr. Crosley:

This letter is the Attorney General's order on Mr. Thompson's petition for disclosure of records under the Oregon Public Records Law, ORS 192.410-192.505.[1] The petition seeks disclosure of records requested from the Public Employees Retirement System (PERS) by Mr. Thompson, a staff reporter for the *Statesman Journal*, in two e-mails to PERS dated August 3, 2010. In the first e-mail, Mr. Thompson requested the following records for six identified individuals:

- Annual pay at time of retirement.
- Monthly retirement benefits paid to each.
- Which PERS plan they retired under.
- The formula used to calculate their benefits.

[1] We received the petition on October 27, and we appreciate Mr. Thompson and the *Statesman Journal* giving us until December 1, 2010, to respond.

- Whether they receive health benefits from PERS.

In the second e-mail, Mr. Thompson requested the following information about each retiree participating in PERS:

- Name of retiree.
- Employer at time of retirement.
- Annual pay at time of retirement.
- Monthly retirement benefits they now receive.
- Which PERS plan they retired under.
- The formula used to calculate their retirement.
- Whether they receive health benefits through PERS.
- Accrued sick leave or vacation leave applied to their benefit level.

PERS, through its Communications Officer David Crosley, denied each request in part by letters dated August 6, 2010. PERS concluded that certain requested records were categorically exempt from disclosure under ORS 192.502(12), and thus declined to disclose those records. It further concluded that the remaining requested documents were conditionally exempt from disclosure under ORS 192.502(2), and invited Mr. Thompson to submit evidence showing that the conditionally-exempt records should nonetheless be disclosed. [2]

The Oregon Public Records Law, ORS 192.410 to 192.505, confers upon any person the right to inspect any public records of a public body in Oregon, subject to express exemptions. ORS 192.420(1). A public body asserting an exemption bears the burden of sustaining its action on appeal to the Attorney General or the courts. ORS 192.450(1); ORS 192.490(1). PERS asserted two exemptions in denying Mr. Thompson's request: ORS 192.502(12) (the "PERS exemption") and ORS 192.502(2) (the "privacy exemption"). For the reasons that follow, we conclude that, with the exception of the retirees' last annual salary, the information requested by Mr. Thompson is not exempt under those provisions. We consequently grant Mr. Thompson's petition in part and deny it in part.

Analysis

1. The exemptions claimed by PERS.

As noted above, PERS based its denial of Mr. Thompson's records requests on two exemptions: the PERS exemption, ORS 192.502(12), and the privacy exemption, ORS

[2] At the time PERS issued its letters to Mr. Thompson, prior Public Records Orders had determined that release of individualized benefit information was an unreasonable invasion of privacy, which meant that PERS had to determine only whether the public interest in disclosure outweighed the privacy interest. As discussed below, in Public Records Order, October 1, 2010, Hinkle ("Hinkle"), we concluded that release of an individual's benefit amount (and other items) is not an unreasonable invasion of privacy. Accordingly, despite the fact that PERS' letters to Mr. Thompson invited Mr. Thompson to make the showing required by the balancing test, there no longer is any reason to require that, because the balancing test must be done only if there is a determination that disclosure would be an unreasonable invasion of privacy.

192.502(2). PERS found that information regarding (1) a member's annual pay at the time of retirement; (2) a member's employer at the time of retirement; (3) the plan under which a member retired; (4) the formula used to compute a member's benefits; and (5) whether the member receives health benefits through PERS, is unconditionally exempt from disclosure under the PERS exemption, ORS 192.502(12). That provision exempts from disclosure "[e]mployee and retiree address, telephone number and other non-financial membership records and employee financial records maintained by the Public Employees Retirement System pursuant to ORS chapter 238 and 238A." ORS 192.502(12).

PERS found that the balance of the information requested by Mr. Thompson was conditionally exempt from disclosure under the privacy exemption, ORS 192.502(2). That provision exempts from disclosure

> Information of a personal nature such as but not limited to that kept in a personal, medical, or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that the public disclosure would not constitute an unreasonable invasion of privacy.

ORS 192.502(2). PERS also noted that "the conditional exemption of ORS 192.502(2) may also apply to some or all" of the records that PERS found to be unconditionally exempt from disclosure under ORS 192.502(12).

With respect to the records that PERS concluded were conditionally exempt from disclosure, PERS invited Mr. Thompson to make a showing that the records should be disclosed. PERS explained:

> PERS will release conditionally exempt records only if to do so would not constitute an unreasonable invasion of privacy and if there is clear and convincing evidence that the disclosure is in the public's interest. You have the burden of proving that your request meets these standards.
>
> To meet these standards, you must first prove that releasing the record(s) is not an unreasonable invasion of privacy. Your proof must demonstrate that an ordinary, reasonable person would not deem the release of the requested record(s) to be highly offensive, taking into account the likely actions of those to whom the record is released, and taking into account the particular facts in the case, or that the person has no reasonable expectation that the record is private information.
>
> Besides showing that providing the record is not an unreasonable invasion of privacy under the above standard, you must also show clear and convincing proof that the disclosure is in the public's interest. Public interests that have been recognized include the right of citizens to monitor how elected and appointed officials and public bodies are conducting the public's business; and how they are administering particular programs.

Mr. Thompson did not attempt to make that showing with respect to the records that PERS concluded were conditionally exempt.[3] Instead, on October 27, 2010, Mr. Thompson submitted the instant petition requesting us to review PERS' denial of his records requests.

2. Our decision in Public Records Order, October 1, 2010, Hinkle ("Hinkle").

After PERS denied Mr. Thompson's record requests, but before he submitted the petition, we addressed a similar records request to PERS in Public Records Order, October 1, 2010, Hinkle ("Hinkle"). In Hinkle, the *Oregonian* requested a variety of information from PERS about retirees receiving annual benefits of $100,000 or more: those retirees' names, their retirement dates, their employers, their years of service, their job classifications or jobs, their final average salaries, their regular monthly benefits, any other monthly benefits, and any other benefit from PERS. PERS denied the request, reasoning, as it did here, that the requested records were exempt under the PERS exemption and the privacy exemption.

The *Oregonian* petitioned our office for review of PERS' denial, and we ordered the records disclosed, even though in several prior Public Records Orders we had concluded that similar records were exempt from disclosure. In Hinkle, we reasoned that the requested information was not exempt from disclosure under ORS 192.502(2) because its disclosure would not be "highly offensive" to the ordinary reasonable person. Thus, disclosure would not be an unreasonable invasion of privacy. We further reasoned that the requested information was not exempt from disclosure under ORS 192.502(12) because (1) none of it qualified as "employee financial records"; and (2) the requested information did not qualify as the type of "nonfinancial membership records" which are exempt from disclosure under ORS 192.502(12). Specifically, after analyzing the text, context, and legislative history of ORS 192.502(12), we concluded that the provision does not exempt from disclosure *all* nonfinancial records of members; rather, it exempts from disclosure *only* those "nonfinancial records the disclosure of which would intrude on a member's privacy." Because none of the nonfinancial records requested were the type of record the disclosure of which would intrude on retirees' privacy, they were not exempt from disclosure.

PERS has filed suit in Marion County Circuit Court, effectively challenging our order in Hinkle.

3. Hinkle requires the disclosure of retiree names, employers at time of retirement, and current monthly benefits.

As an initial matter, in light of our decision in Hinkle, we grant Mr. Thompson's petition with respect to his request for retiree names, employers at the time of retirement, and current monthly benefit. As noted above, we expressly concluded in Hinkle that that particular information was not exempt from disclosure under either ORS 192.502(2) or ORS 192.502(12). We adhere to that analysis here.

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[3] As noted above in footnote 2, we have now concluded that the showing required by PERS is not necessary for the type of documents requested by Mr. Thompson.

4. Annual pay at time of retirement is unconditionally exempt from disclosure under ORS 192.502.

We agree with PERS that a retiree's annual pay at the time of retirement is unconditionally exempt from disclosure under ORS 192.502(12). That information constitutes an "employee financial record maintained by PERS under chapters 238 and 238A." It is a "financial record" because it is a record regarding financial information: actual salary. It is an "employee financial record" (not a "retiree" financial record) because it is a record transmitted to PERS from the PERS member's employer, not a record generated by PERS in connection with the PERS member's retirement. *See* OAR 459-009-0100; 459-070-0100 (describing information that employers must report to PERS). As result, we decline to order PERS to disclose that information.

5. The PERS plan under which an employee retired must be disclosed.

We next conclude that PERS must disclose the PERS plans under which current retirees retired. After filing the petition, Mr. Thompson clarified that the information he is seeking with this request is whether a retiree retired under Tier One, Tier Two, or the Oregon Public Service Retirement Plan (OPSRP). Although PERS concluded that this information is categorically exempt from disclosure under ORS 192.502(12), applying our analysis in Hinkle, we conclude that is not.

The plan under which a retiree retired is a nonfinancial record. As we concluded in Hinkle, only those "nonfinancial records the disclosure of which would intrude on a member's privacy" are exempt from disclosure under ORS 192.502(12). Disclosure of the plan under which a member retired would not intrude on a member's privacy; it would reveal, at most, the window of time in which the member began his or her public service. Tier One members are public employees who joined PERS before January 1, 1996. ORS 238.430; *Strunk v. Public Employees Retirement Bd.*, 338 Or 145, 158, 108 P3d 1058 (2005). Tier Two members are those who joined PERS between January 1, 1996, and August 29, 2003. ORS 238A.025(2) (specifying start date for OPSRP); *Strunk* at 159. OPSRP members are those who joined PERS on or after August 29, 2003. We do not consider the range of time in which an employee began public employment to be a private matter. *See, e.g.*, Hinkle at 11 (concluding that disclosure of retiree's "years of service" does not implicate any privacy concern).

For similar reasons, this information also is not exempt from disclosure under ORS 192.502(2). Because we have concluded that disclosure of it does not intrude upon PERS members' privacy interests, the disclosure of it would not be "highly offensive" to the ordinary reasonable person.

Records of the plans under which retirees retired thus are subject to disclosure under the Public Records Law. PERS must disclose that information.

6. The formula used to compute a retiree's benefits must be disclosed.

PERS must disclose the formula it used to compute each retiree's benefit. After filing the petition, Mr. Thompson clarified that the information he seeks with this request is which among the three different formulas that PERS uses to compute benefits for Tier One and Tier Two retirees PERS used to compute the benefits for each retiree. We understand this to mean that Mr. Thompson wants to know whether PERS computed a given retiree's benefit using Full Formula, Pension Plus Annuity, or Money Match. *See Strunk*, 338 Or at 160-61 (describing formulas used to compute benefits for Tier One and Tier Two PERS members). PERS concluded that this information was exempt from disclosure under ORS 192.502(12). We disagree.

This information is nonfinancial information. However, it is not the type of nonfinancial information the disclosure of which would invade a member's privacy. PERS, on its own, determines what formula to use to compute a retiree's benefit. It does so by first computing the retiree's benefit under each of the three formulas. *Strunk*, 158 Or App at 161. PERS then uses whichever of the three formulas yields the greatest benefit to compute the retiree's actual benefit. *Id.* Thus, the information reveals nothing private about individual PERS members or their personal choices; it simply reveals the math that PERS used to compute their benefits.[4] In other words, it shines a light on PERS' administration of the system, not on individual PERS members. As a result, under Hinkle, it is not the type of nonfinancial information which is exempt from disclosure under ORS 192.502(12).

For the same reasons, the formula PERS used to compute a particular retiree's benefit is not exempt from disclosure under ORS 192.502(2). Because release of the information does not intrude on members' privacy interests, the ordinary reasonable person would not find the disclosure of the formulas to be highly offensive. Instead, we believe the ordinary reasonable person would conclude that it is the type of information that should be available to the public so that it can evaluate PERS' administration of the system.

Records of the formulas used to compute individual retirees' benefits thus are subject to disclosure under the Public Records Law. PERS must disclose that information.

7. The amount of accrued sick leave and vacation leave applied to a retiree's benefit level must be disclosed.

Mr. Thompson next seeks records of the amount of accrued sick leave and vacation leave used to determine each retiree's benefits.[5] PERS concluded that the information was conditionally exempt from disclosure under ORS 192.502(2), and invited Mr. Thompson to prove that its disclosure would not be an invasion of privacy and would be in the public interest. Although Mr. Thompson did not attempt to make that showing, we conclude that the information should be disclosed under our decisions in Hinkle and in Public Record Order, May 5, 1994, Wright ("Wright").

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[4] The determination made by PERS is under ORS 238.300. Once PERS determines which formula yields the maximum benefit, the member may then select one of the options under ORS 238.305.

[5] Accrued sick and vacation leave can be used to increase a retiree's retirement benefit under statutorily-specified circumstances. ORS 238.350; OAR 459-011-0500.

The question, as framed by Hinkle, is whether the disclosure of the amount of accrued sick leave and vacation leave applied to determine a retiree's benefit level would be highly offensive to the ordinary reasonable person. Our decision in Wright shows that the answer to that question is "no."

In Wright, we addressed whether records of corrections' employees use of vacation leave and sick leave were exempt from disclosure under the privacy exemption. Although we found that records of leave usage constituted information of a "personal nature" within the meaning of ORS 192.502(2), we concluded that the disclosure of that information would not work an unreasonable invasion of privacy. We reasoned:

> The amount and frequency of time an individual takes off work for vacation is evidence of the individual's choices regarding his or her personal life. Use of sick leave may reveal information about the individual's personal health. Similarly, the fact that an individual has taken leave without pay may reveal information about the individual's private life. However, the disclosure of such information would not constitute an "unreasonable" invasion of the individual's privacy. The information sought is not documentation supporting the particular type of leave taken, such as the reasons why an individual took sick leave or whether vacation was for the purposes of a trip, but only the date, hours, and type of leave. Generally, an individual's co-workers are well aware of the general reason that an employee is off from work and the length of time that he or she is gone. This is not the type of information that an ordinary reasonable person would deem highly offensive to disclose.

We reaffirm that reasoning and it persuades that the information that Mr. Thompson seeks here—total accrued sick leave and vacation leave applied to compute individual retirees' benefits—must be disclosed. That information is even less intrusive than the information sought in Wright. Unlike in Wright, Mr. Thompson does not seek information regarding when particular employees took specific types of leave; he simply seeks information regarding how much leave public employees had left at the end of their careers if that leave was used to increase their PERS benefits. That information reveals very little about individual retirees; it discloses nothing about why individual employees chose to take the leave that they did, or when they took leave. As a result, for the same reasons we identified in Wright, we believe that an ordinary reasonable person would not deem the disclosure of the amount of accrued vacation and sick leave applied to a retiree's benefit level to be highly offensive. Therefore, the information is not exempt from disclosure under ORS 192.502(2).

PERS did not assert that the information regarding accrued leave used to increase benefit levels is exempt from disclosure under ORS 192.502(12); we agree that it is not. For the same reasons that the disclosure is not an unreasonable invasion of privacy, the disclosure of these nonfinancial records would not be an intrusion on individual retirees' privacy.

In short, PERS must disclose records regarding the amount of accrued sick leave and vacation leave used to determine retirees' benefits level, if any.[6]

8. A retiree's election to purchase health benefits through PERS must be disclosed.

Finally, Mr. Thompson has requested records as to whether individual retirees obtain health benefits through PERS.[7] PERS concluded that these records were "nonfinancial membership records" that are exempt from disclosure under ORS 192.502(12). Applying our analysis in Hinkle, we disagree.

Although the records are nonfinancial records of members, under Hinkle they are exempt from disclosure under ORS 192.502(12) only if the disclosure of those records intrudes upon retirees' privacy. We do not think that disclosing that a person has chosen to obtain his or her health insurance through PERS works an invasion of privacy. It is not uncommon for people, retired or otherwise, to obtain health insurance. The fact that a retiree has done so (and done so through PERS) reveals little about the private interests of the retirees. It does not reveal, for example, personal information such as whether, to what extent, and for what purpose a retiree and his or her dependents use their health insurance. Instead, it discloses only that an individual retiree chose PERS health coverage. We do not believe that that is the type of information ordinarily viewed as private; people often discuss their insurance plans with friends, family, and representatives of various insurance companies in the attempt to identify what providers offer the best options.

Under the same reasoning, records of whether retirees obtain health benefits through PERS are not exempt from disclosure under ORS 192.502(2). An ordinary reasonable person would not find it highly offensive to disclose that a person has obtained health benefits from a particular provider.

In sum, PERS must disclose whether retirees are obtaining health benefits through PERS.

Conclusion and Order

For the reasons described above, we conclude retirees' annual salary at time of retirement is employee financial information that is exempt from disclosure under ORS 192.502(12). We conclude that all other information requested by Mr. Thompson is not exempt from disclosure under either ORS 192.502(2) or ORS 192.502(12). We therefore grant Mr. Thompson's petition in part and deny it in part.

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[6] We understand that vacation leave may be used only for Tier One (*see* ORS 238.435(1)), and sick leave may be used for Tier One and Tier Two only if the employer elects to allow it, and not if the formula used is Money Match (*see* ORS 238.350(1)), stating that unused sick leave is added to final average salary, which is not relevant to money match). Hence, PERS may not have this information for any retiree who retired under Money Match, and will not have it for retirees from any employer who do not provide for inclusion of unused sick leave.

[7] PERS retirees have the option of purchasing health insurance through PERS upon retirement. *See* http://www.pershealth.com/members/retire_options.shtml (last visited November 9, 2010).

ORS 192.450 provides PERS with seven days to comply with an order of the Attorney General or announce its intention to seek judicial review. We also understand that some of the information requested by Mr. Thompson may not be readily accessible and may take a substantial amount of work to compile, given the broad scope of Mr. Thompson's request. And PERS is entitled to establish a fee reasonably calculated to reimburse it for the actual cost of complying with this order. ORS 192.440(4). We understand PERS will do so.

As we did in Hinkle, we think it is appropriate to frame our order in a way that reflects these realities. We therefore order as follows:

> PERS shall begin compiling the information, shall provide any information that PERS reasonably can provide within seven days, and shall continue to compile and disclose any remaining information after the conclusion of the seven day period as promptly as PERS reasonably can.

This order is contingent on Mr. Thompson either agreeing to pay the requisite fees or establishing that he is entitled to a waiver of those fees. The time for compliance with this order shall be tolled during any period in which PERS is waiting for Mr. Thompson to either confirm his willingness to pay fees associated with his request or attempt to establish his entitlement to a waiver of those fees. In complying with this order, PERS is not precluded from removing other information appearing in its records, such as social security numbers, that PERS concludes may be exempt, subject to Mr. Thompson's right of petition. But the information specifically requested by Mr. Thompson, with the exception of retirees' annual salaries at the time of retirement, is not exempt and must be disclosed to the extent PERS maintains it.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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