

UNIVERSITY OF OREGON

MEMO FROM: Peter B Gilkey (UO Senate President 2009/10)

MEMO TO: Richard Lariviere (UO President)

MEMO CC: Melinda Grier (General Counsel)

John Bonine (Law)

MEMO DATE: 12 January 2010

MEMO RE: Four questions raised by John Bonine.

Dear President Lariviere:

I am attaching to this memo a copy of an email I received recently from Professor John Bonine in which he raises 4 questions to which he would like answers. I am forwarding them on to you and Melinda in this regard. The questions all relate to actions that I have undertaken recently as Senate President. John writes to me:

1. First, someone in the Office of the General Counsel is sending letters or messages to you and the entire campus community without signing his or her name.
2. Second, I am surprised that the University Senate President cannot request documents as you have done without using the Oregon Public Records Law.
3. Third, I note that you have been told that you must pay a fee to the Office of General Counsel for documents that you request under the Oregon Public Records Law.
4. Fourth, on January 8 someone (unidentified) in the "Office of the General Counsel" sent out an "Election Reminder" email to the whole community that makes statements of "state law" involving elections.

Item 1 refers to a memo that I posted on the Senate Web site dated 20 November 2009 and Item 4 refers to a memo I posted on the Senate Web site which is an election reminder from the general counsels office. I attach those documents to this letter. I also attach information concerning 2 and 3.

Respectfully submitted

Peter B Gilkey
President (2009/10) UO Senate.

Documents Attached:

Pages 2-5 Email from John Bonine

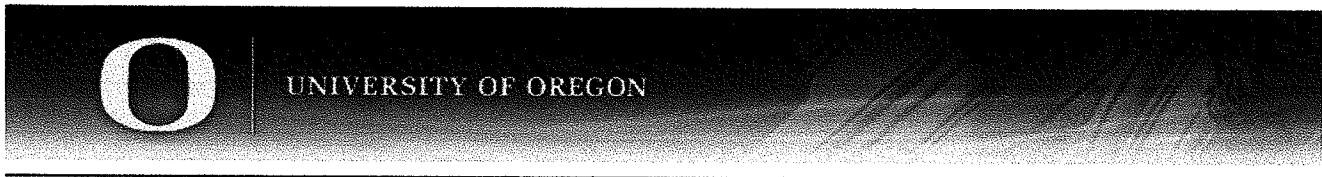
Pages 6-8 Memo from the General Counsels Office (relates to 1.)

Pages 9-10 Email from Gilkey to the General Counsel (relates to 2.)

Page 11 Election reminder from the General Counsel (relates to 4)

Page 12 Receipt (relates to 3)

Pages 13-14 Email to the General Counsel (relates to 2.)



Subject: Questions to University President
To: "Peter B Gilkey"
From: "John E Bonine \(\UO\)"
Date: Tue, 12 Jan 2010 15:00:42

Dear Peter,

I noticed four things recently that could be clarified for Senate members and their constituents by the University President. If you would be so kind as to seek answers, I would appreciate it. You may forward this message or post it as you wish.

- 1. First, someone in the Office of the General Counsel is sending letters or messages to you and the entire campus community without signing his or her name.

Is that practice endorsed by the President? In a collegial university and also to retain a modicum of accountability, signing a name to letters and messages seems like a basic principle.

- 2. Second, I am surprised that the University Senate President cannot request documents as you have done without using the Oregon Public Records Law.

Could you ask the President whether the Office of the General Counsel could be instructed to respond to requests of the University Senate President and perhaps other members of the University Senate without such formalities and within a week unless extenuating circumstances exist?

- 3. Third, I note that you have been told that you must pay a fee to the Office of General Counsel for documents that you request under the Oregon Public Records Law.

I would like to know whether the University President believes that charging fees to the Senate President for documents involving University business (and of interest to the Senate) is an appropriate measure taken by his Office of General Counsel or other offices in the University.

In this regard, I note that the "Office of the General Counsel," in an unsigned letter sent to you on November 20, 2009, said this about waiver of fees:

"State agencies like the University may waive public records fees in some circumstances if doing so serves "the general public," in contrast to a concern or interest of a private individual or entity."

<http://www.uoregon.edu/~uosenate/dirsen090/MemorandumFinancialImpactUS0910-7Motion.pdf>

The unsigned letter did not cite any statute or judicial authority for this summary of the waiver authority in the Oregon Public Records Law, but the relevant statutory citation is ORS 192.440(5) and the phrase "a concern or interest of a private individual or entity" comes from an Oregon Court of Appeals case, *In Defense of Animals v. OHSU*, 199 Or App 160, 187-189, 112 P3d 336 (2005). The issue is also discussed at page 18 of the Attorney General's Public Records and Meetings Manual at page 18, notes 55-58, citing the Oregon Court of Appeals case. See http://www.doj.state.or.us/pdf/public_records_and_meetings_manual.pdf.

I would think that the test of public versus private benefit ORS precisely support grants of fee waivers to requests made by the University Senate President on matters of potential interest to the University community

-- or, for that matter, others who are seeking transparency in University operations and not simply trying to gain personal benefit.

Your practice as University Senate President of posting materials on the publicly available World Wide Web where the constituents of the Senate as well as others may read them would seem to support further a conclusion that a request is in the "public interest" and the "interests of the community" rather than merely for private benefit.

- 4. Fourth, on January 8 someone (unidentified) in the "Office of the General Counsel" sent out an "Election Reminder" email to the whole community that makes statements of "state law" involving elections.

I would like to know whether the University President considers such unsigned emails from the Office of the General Counsel to be orders issued under his authority to individual faculty members that must be obeyed, legal advice to faculty members, or something else. In a community of scholars, in which the faculty are, by

University Charter, in charge of the immediate governance of the University including its discipline, it is important to be clear on such matters.

In considering an answer to this, I offer the following thoughts, which include pointing out at least one legal error in the Jan. 8 email.

a. Orders to faculty

It may be that the Jan. 8 email purports to issue orders to the faculty. It says "you can't" do certain things. Does the Office of General Counsel or someone in it have the power to issue orders to the faculty? Put another way, does the President consider that violation of the injunctions in the Jan. 8 memo can be the subject of university disciplinary action against faculty members, simply because the prohibitions are contained in an unsigned memo from someone in the Office of General Counsel? If so, is that consistent with the University Charter and the model of governance that it sets forth. Or are the disciplinary standards for faculty only those that are adopted formally in a participatory process?

b. Legal advice

It may be that the email is intended only as well-intentioned legal advice regarding state election law, by someone in the Office of General Counsel. However, if this is the case, it is weak, for it provides no citations or support for its legal advice. If the various "you can't" statements are drawn from words of the statute, the statutory subsection should be cited. If the "you can't's" are drawn from court interpretations of the state law, we should know which court opinions stand for which "you can't's." If the "you can't's" are drawn from official Opinions of the Attorney General of Oregon, we should have the citations for each statement.

The professional standard for legal opinions is that they be accompanied by supporting documentation of authority. This is especially true for reasons of transparency and accountability when counsel for a public body gives legal advice implicating public interests. Those interests, of course, include academic freedom and freedom of expression under the Oregon and U.S. Constitutions.

On the other hand, if some of these statements are simply statements by someone in the Office of General Counsel that it would be politically inadvisable to do certain things -- that is, that for employees to do certain things might get the University in political trouble -- then this advice should be stated as such, and probably should not come from the Office of General Counsel.

c. Erroneous orders or legal advice by Office of General Counsel

Whether the Jan. 8 email is intended to be an order to faculty or legal advice, it is important to note that parts of it are wrong.

The phrase "This means" in the email below, following a reference to state election law, goes far beyond what the state election law actually says or means. For example, the Jan. 8, 2010, email states that state election law "means" that:

"YOU CANT post political posters or flyers in public work spaces or facing out on doors or windows."

The General Counsel to the President told me the opposite in an email dated Oct. 27, 2008, regarding a similar statement that she sent out to the university community prior to the Nov. 2008 election. She wrote:

"As you are probably aware, that is not a prohibition based on statutory restriction. It is a UO decision (not mine). Because it has been some time and some of the decision-makers had changed since UO decided that was appropriate policy, I asked the question again. The decision remains unchanged. The basis for the restriction is a belief that UO should provide a welcoming environment to students regardless of their political beliefs. When students see political posters or flyers in public work spaces, it is likely to be unclear if the materials express an employee's personal beliefs or the university's support or opposition to a candidate or ballot measure."

I have been unable to find any official UO policy on this matter. But even assuming that such a policy exists, I think that emails to the faculty from a lawyer working for the University should be careful in stating what is required or prohibited by state election law and what is a UO policy, and not conflate the two. Laypersons often repose a great deal of trust in lawyers.

I trust that these questions will be taken in the spirit in which they are offered - to seek greater clarity in roles and responsibilities in this time of transition for the University, as well as to promote transparency and faculty governance.

Thanks, John

-----Original Message-----

From: hrdist@uoregon.edu [mailto:hrdist@uoregon.edu]
Sent: Friday, January 08, 2010 10:41 AM
Subject: [HR] Election Reminder from the Office of the General Counsel

An Election Reminder from the Office of the General Counsel

Just a reminder -- state law prohibits use of public funds to advocate for or against a ballot measure or candidate and prohibits state employees from requiring other employees, on the job or off, to support or oppose a ballot measure. This means:

YOU CAN provide balanced, objective informational background on ballot measures, but

YOU CANT spend work time advocating or opposing a ballot measure or candidate.

YOU CAN use your own time, including lunch hours or coffee breaks for political work, but

YOU CANT use state resources (copying machines, faxes, computers, postage) for political work on a ballot measure or to help a candidate.

YOU CAN wear campaign buttons at work, but

YOU CANT post political posters or flyers in public work spaces or facing out on doors or windows.

YOU CAN write letters expressing your opinion on ballot measures and candidates, but

YOU CANT use your university title in a way that suggests you represent the University's position.

YOU CAN discuss your political opinions with co-workers during breaks or away from work, but

YOU CANT require or coerce those who you supervise to take a position or participate in political activities.

Web page spun on 12 January 2010 by [Peter B Gilkey](#) 202 Deady Hall, Department of [Mathematics](#) at the [University of Oregon](#), Eugene OR 97403-1222, U.S.A. Phone 1-541-346-4717 Email: peter.gilkey.cc.67@uoregon.edu of [Deady Spider Enterprises](#)



UNIVERSITY OF OREGON

MEMORANDUM

To: Peter Gilkey, Senate President
From: Office of the General Counsel
Date: November 20, 2009
Re: Fiscal Impact of Public Records Requests for US09/10-7 Motion

Since May 2006, the University of Oregon has received approximately 400 public records requests. Approximately 101 of those requests were submitted by University personnel. Of those 101 requests, 96 were from a single faculty member, two were from another faculty member, two were from two other faculty members (one request each), and one request was from a staff person. (See Exhibit A)

Under Oregon law, public records requesters may petition the University's response to their requests to the Oregon Department of Justice (ODOJ) if they disagree with the University's decision. From May of 2006 to November of 2009, 44 petitions of the University's responses have been filed with the ODOJ. Thirty-five of those petitions were filed by a single University faculty member, all of which were denied.

Charges to the University from the ODOJ associated with the 44 public records petitions total \$65,626.25. \$36,412.60 of that amount is from the faculty member that filed the 35 petitions. That amount does not include the hours of University staff time it took to gather and provide information requested by the ODOJ so that it could properly analyze the petitions and determine whether they should be denied. It also does not include the University's time to initially respond to the underlying public records requests, generate cost estimates, and review documents to determine if they may be lawfully released. If the University's staff time were added into the calculus, the cost to the University of responding to the faculty member's public records requests and subsequent petitions to ODOJ would exceed \$67,000.00.

Gilkey-12Jan10-6

THE UNIVERSITY OF OREGON

1226 University of Oregon, Eugene OR 97403-1266 T (541) 346-1000 TTY (541) 346-1021 www.uoregon.edu

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Non-reimbursable costs to the University associated with public records requests average \$50 - \$60 per request, which is primarily staff time. Reimbursable costs as detailed in the public records statutes are provided in an estimate to the requester. Following is an outline of how costs are determined.

The University charges a copy fee of 25 cents per page. The University also charges for the actual cost of making public records available. The charge includes, but is not limited to, staff costs for locating, gathering, summarizing, compiling, reviewing, tailoring or redacting the public records to respond to a request. The charge may also include the cost of time spent by an attorney in reviewing the public records, redacting material from the public records, or segregating the public records into exempt and nonexempt records. If the request is to inspect records, the charge includes the time for records to be prepared for review and the cost of staff time for a staff member to be present while the requester reviews the records to preserve the integrity of the University's records. The charge will also include the cost of sending the records where copies are requested.

The cost of time for each employee is calculated by multiplying the employee's hourly wage calculation (including benefits expenses) by the hours or portions thereof necessary to locate, gather, summarize, compile, tailor, review, redact, segregate, certify or attend the inspection of the public records requested.

State agencies like the University may waive public records fees in some circumstances if doing so serves "the general public," in contrast to a concern or interest of a private individual or entity. But even in cases where the University has authority to waive fees, it generally charges public records requestors for the reimbursable actual costs associated with responding to their requests in order to help recover the costs of responding to public records requests. As noted above, the University receives a plethora of public records requests every year, and if it did not recover the costs it could lawfully recover for responding to those requests, departments called upon to respond to the request would have to cover the cost of doing so with tuition dollars, state-appropriated money or other sources of revenue (grants, gifts, etc . . .).

Gilkey-12Jan10-7

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EXHIBIT A

UO Employee	Number of Public Records Requests, May 2006 – current	Number of Petitions to Department of Justice	Department of Justice Costs Billed to UO
Faculty	1	0	
Faculty	1	0	
Faculty	96	35	\$36,412.60
Faculty	2	0	
Staff	1	0	
Total	101	35	

Gilkey-12Jan10-8



UNIVERSITY OF OREGON

Subject: Re: University of Oregon Public Records Request Estimate
To: "General Counsel"
From: "Peter B Gilkey"
Date: Thu, 10 Dec 2009 10:22:24

I am on my way with the money.

Peter B Gilkey

See Receipt for \$14.79. This was paid by Peter Gilkey directly. No University or State or Foundation funds were used. PBG

Subject: University of Oregon Public Records Request Estimate - Gilkey
To: "Peter Gilkey"
From: "General Counsel"
Date: Thu, 10 Dec 2009 09:04:37

Dear Professor Gilkey:

The University of Oregon received your public records request for a copy of the additional supporting evidence for the memo submitted to you by our office concerning US09/10-7 motion. You also requested a copy of the backup for calculating the estimate. The University is now providing an estimate.

The University estimates the actual cost of providing the documents responsive to your request to be \$14.79. Upon receipt of a check made payable to the University of Oregon in the amount of \$14.79, the University will proceed to locate, copy, and provide the records you have requested that are not exempt from disclosure. Your check may be sent to the attention of the General Counsel's office at 1226 University of Oregon, Johnson Hall, Room 219, Eugene, OR 97403-1226.

Please note that if the cost of preparing the documents for you is less than the estimate, we will refund the difference. If the cost of preparing the report for you exceeds the estimate, however, you may be charged for the difference. Following is an outline of how costs are determined.

The University charges a copy fee of 25 cents per page. The University also charges for the actual cost of making public records available. The charge includes, but is not limited to, staff costs for locating, gathering, summarizing, compiling, reviewing, tailoring or redacting the public records to respond to a request. The charge may also include the cost of time spent by an attorney in reviewing the public records, redacting material from the public records, or segregating the public records into exempt and nonexempt records. If the request is to inspect records, the charge includes the time for records to be prepared for review and the cost of staff time for a staff member to be present while the requester reviews the records to preserve the integrity of the University's records. If the request is to certify the records as true copies, the charge will include employee time spent in doing so. The charge will also include the cost of sending the records where copies are requested.

The cost of time for each employee is calculated by multiplying the employee's hourly wage calculation (including benefits expenses) by the hours or portions thereof necessary to locate, gather, summarize, compile, tailor, review, redact, segregate, certify or attend the inspection of the public records requested.

Thank you for contacting the University with your request.

Sincerely,

Office of the General Counsel

University of Oregon

Web page spun on 10 December 2009 by Peter B Gilkey 202 Deady Hall, Department of Mathematics at the University of Oregon, Eugene OR 97403-1222, U.S.A. Phone 1-541-346-4717 Email: peter.gilkey.cc.67@uoregon.edu of Deady Spider Enterprises

Gilkey-12Jan10-10



The following email was received Friday 8 January 2010

An Election Reminder from the Office of the General Counsel

Just a reminder -- state law prohibits use of public funds to advocate for or against a ballot measure or candidate and prohibits state employees from requiring other employees, on the job or off, to support or oppose a ballot measure. This means:

YOU CAN provide balanced, objective informational background on ballot measures, but

YOU CANT spend work time advocating or opposing a ballot measure or candidate.

YOU CAN use your own time, including lunch hours or coffee breaks for political work, but

YOU CANT use state resources (copying machines, faxes, computers, postage) for political work on a ballot measure or to help a candidate.

YOU CAN wear campaign buttons at work, but

YOU CANT post political posters or flyers in public work spaces or facing out on doors or windows.

YOU CAN write letters expressing your opinion on ballot measures and candidates, but

YOU CANT use your university title in a way that suggests you represent the University's position.

YOU CAN discuss your political opinions with co-workers during breaks or away from work, but

YOU CANT require or coerce those who you supervise to take a position or participate in political activities.

Web page spun on 8 January 2010 by Peter B Gilkey 202 Deady Hall, Department of Mathematics at the University of Oregon, Eugene OR 97403-1222, U.S.A. Phone 1-541-346-4717 Email: peter.gilkey.cc.67@aya.vale.edu of Deady Spider Enterprises

Gilkey-12Jan10-11

12/9/2009

PRR/Gilkey			
	Hourly w/ OPE	5 min	10 min
COS	\$ 54.10		\$ 9.02
AGC	\$ 69.25	\$ 5.77	

Total \$ 14.79

RECEIPT		NO. 2009 - PG
Payee Name: University of Oregon - General Counsel Address: 1226 University of Oregon City, ST ZIP Code: Eugene, OR 97403-1226		Payer Name: Peter Gilkey University of Oregon Senate President
DATE	DESCRIPTION	AMOUNT
12/10/09	Payment for public records request re: US09/10 Motion fiscal impact memo backup	\$14.79
	SUBTOTAL	\$14.79
	TAX	0.00
	TOTAL	\$14.79

Gilkey-12Jan10-12



UNIVERSITY OF OREGON

Subject: Re: University of Oregon Public Records Request - Gilkey

To: "General Counsel"

From: "Peter B Gilkey"

Date: Fri, 4 Dec 2009 20:06:35

Dear General Counsel.

I shall await the estimate eagerly. If it could come during the forthcoming week (the week of final exams), that would be very nice. I depart for Spain Monday 14 December 2009 and shall be away until Saturday 2 January 2010. This is a professional trip as I shall be consulting with colleagues in Santiago de Compostela concerning a joint mathematics project and with colleagues in Madrid concerning a project in mathematical linguistics. But it does mean that I would like to have written a personal check for the necessary expenses before departing.

Cheers.

Peter B Gilkey
Professor of Mathematics
University of Oregon
Eugene Or 97403

PBG:ep

On Fri, 4 Dec 2009 14:46:08 -0800, "General Counsel" wrote:

Dear Professor Gilkey:

The University of Oregon has received your public records request for a copy of the additional supporting evidence for the memo submitted to you by our office concerning US09/10-7 motion. The University is the custodian of at least some of the records you have requested. An estimate of the costs for preparing documents related to your request will be provided to you within a reasonable time. The actual cost of producing public records includes the following.

The University charges a copy fee of 25 cents per page. The University also charges for the actual cost of making public records available. The charge includes, but is not limited to, staff costs for locating, gathering, summarizing, compiling, reviewing, tailoring or redacting the public records to respond to a request. The charge may also include the cost of time spent by an attorney in reviewing the public records, redacting material from the public records, or segregating the public records into exempt and nonexempt records. If the request is to inspect records, the charge includes the time for records to be prepared for review and the cost of staff time for a staff member to be present while the requester reviews the records to preserve the integrity of the University's records. If the request is to certify the records as true copies, the charge will include employee time spent in doing so. The charge will also include the cost of sending the records where copies are requested.

The cost of time for each employee is calculated by multiplying the employee's hourly wage calculation (including benefits expenses) by the hours or portions thereof necessary to locate, gather, summarize, compile, tailor, review, redact, segregate, certify or attend the inspection of the public records requested.

Thank you for contacting the University with your request.

Sincerely,

Office of the General Counsel
University of Oregon

This refers to earlier emails with the general counsel of 28 November 2009 which are detailed in <http://www.uoregon.edu/~uosenate/dirsen090/Harbaugh-28Nov09.html> In particular:

Dear Melinda.

If you can provide me with any additional supporting evidence for your Memo concerning US09/10-7 relatively easily, I would be grateful if you could so do with the understanding that I will post any information transmitted on the web. And please redact it appropriately as I have no desire to know nor have a need to know the names of the UO employees who made the public records requests involved. A caveat. My ancestors came from Scotland and subsequently to the Great Upper Peninsula of Michigan. They were a thrifty bunch (some have in fact called them "tight"). I have inherited this tendency. The Senate has no budget for such requests for information from your office. So if you think that it is likely to cost more than \$50, please let me know in advance.

Respectfully submitted

Peter B Gilkey President 2009/10 UO Senate

Web page spun on 4 December 2009 by Peter B Gilkey 202 Deady Hall, Department of Mathematics at the University of Oregon, Eugene OR 97403-1222, U.S.A. Phone 1-541-346-4717 Email: peter.gilkey.cc.67@ava.yale.edu of Deady Spider Enterprises