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To: Lincoln City City Council

From: Dan R. Olsen, Attorney

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Re: Status of Lincoln City Homepage

PRIVILEGED AND CONFIDENTIAL

The City of Lincoln City seeks an independent recommendation regarding whether the 'Lincoln City Homepage' qualifies as 'news media' as that term is used in ORS 192.660(4).

Recommendation: Lincoln City Homepage very likely qualifies as "news media". Representatives of Lincoln City Homepage, therefore, are eligible to attend executive sessions of local governing bodies, subject to the limitations set forth in ORS Chapter 192, including that such representatives not disclose information specified as confidential.

Discussion: Oregon law is unique in permitting representatives of the news media to attend executive sessions. Local governments have struggled with how to responsibly apply this special status given the rise in what often is characterized as "non-traditional" media such as blogs and websites. Technology now affords virtually anyone with a platform to widely disseminate material to the public, effectively bypassing traditional media such as newspapers.

In the context of the litigation exemption from public record disclosure the Attorney General has stated that it is intended to place governmental bodies on an even footing with private parties. That public purpose applies equally to the ability to discuss certain matters privately when disclosure would put the public body, and the public it represents, at a disadvantage or risk of financial liability. The Attorney General also has noted, however, the role that permitting media to attend plays in ensuring that executive sessions are properly conducted and providing background information for the media in its role of helping to keep the public informed. So local governments are faced with a balancing act. This is made even more difficult by the lack of meaningful statutory guidance.

In analyzing this issue, I have reviewed Resolution No. 2010-09, the City's executive session attendance policy, which is modeled after policies adopted by numerous other jurisdictions, the Oregon Government Ethics Commission staff investigation report No. 18-146XMT, Attorney General Opinion No. 2016 and related materials. At the City's request, I provided the 'Lincoln City Homepage' an opportunity to submit any information it deemed relevant to this matter. I had a follow-up call with Justin Werner. As regards the Attorney General Opinion it should be noted that, while essentially binding on state agencies including the OGE, it does not carry the force of law and is not binding on local governments. As noted below, I do not necessarily agree with all of that analysis. There are no specifically relevant appellate decisions.

There are arguments supporting a city policy decision to enforce its policy rather than follow the Attorney General opinion. First, although the Attorney General is correct when she states that a local government cannot contravene state law, she either discounts or ignores the city's home rule authority when the statutes are silent. For purposes of this memo the most important is the legislature's failure to define "news media". An argument can be made that this permits home rule jurisdictions to fill in that gap. Support

for that may be found in the fact that the legislature expressly precluded the OGEC from doing so and could have, but did not, similarly preempt local governments.

In that regard, for example, the model policy and city policy require that an entity seeking access to executive sessions demonstrate that it is "committed to" and "structured to support" enforcement of nondisclosure. I discussed the model policy with one of the local government attorneys involved in its development. He states that there is legislative history supporting such a requirement in that the legislature was relying on how it understood traditional media to operate and police itself. The Attorney General opinion does not address this directly but as a practical matter precludes that requirement. It is worth noting that representatives of the media participated in drafting the model policy. I asked Mr. Werner to respond to this requirement. He stated that he is "aware of the rules regarding executive sessions" and understands that he is not to report what happens in those sessions.

Ultimately, the extent of local authority to define "news media" will be resolved only by litigation. Given recent decisions, such as the Handy decision regarding public meetings, prevailing will be difficult. *Handy v. Lane Cnty.*, 274 Or App 644,662, 362 P.3d 867 (2015). Any policy decision to enforce a more rigorous definition of "news media" should be made only after careful consideration and detailed consultation with counsel.

For the reasons outlined above, therefore, I have relied on the factors identified by the Attorney General.

The Attorney General reached the following relevant conclusions regarding the statutory term "news media":

1. "Representatives of the news media" is not defined. Indeed, ORS 192.660 (10) prohibits the OGEC from adopting rules establishing what entities are considered news media and the OGEC has declined to rule on that issue in enforcement of the executive session statutes. *See also*, ORS 244.290.

2. It does not have a "well-established legal meaning", accordingly it must be defined using the methodology provided by the courts for ascertaining legislative intent.

3. There is no First Amendment right to attend executive sessions, it is purely a statutory right.

4. Executive sessions are not limited to 'traditional print media' and whether a person or entity qualifies must be determined on a "case-by-case basis." The Legislature anticipated that new forms of disseminating news would emerge and qualify notwithstanding that it did not foresee technology that would enable the rise of a "large class of 'citizen journalists'".

5. In general terms "news media" means "channels, methods, or systems of communicating recent events or new information of interest to the recipients" i.e. "newsworthy" and representatives are "news gatherers".

6. "Institutional news media" is limited to those formally organized for the purpose of gathering and disseminating news. Representatives are those who have a formal affiliation with and authorization from an institutional news medium such as an agent, employee or contractor. This contrasts with those who seek to obtain information or speak personally or for a primarily personal objective or whose relationship with institutional news media is casual or undefined.

7. It is limited to those who "regularly publish or broadcast the news" whether generally or normally limited to covering specific subject areas.

8. Factors to consider include "business structure", the "nature of its overall operations", and "regular public dissemination of news."

Lincoln City Homepage is an assumed business name for Justin Thomas Werner. It is a sole proprietorship. According to its filing with the Corporations Division its "business activity" is "Reports Local Lincoln City News". It was registered June 6, 2018. Although it could be clearer if formed as a corporation with articles of incorporation and bylaws that have some limited legal effect, this provides evidence that it is formed for the purpose of gathering and disseminating news.

Mr. Werner reports that he publishes stories daily, with as many as 10 new articles a day. The website contains numerous articles relaying a wide range of information about city government. Most are credited to "Homepage Staff" with some expressly crediting Justin Werner or Jim Fossum. Many include reference responses to inquiries from Homepage and quotes that appear to have been gathered by Homepage. The website also contains a wide range of community related articles including sports, weather and event coverage.

In perusing the articles, they primarily appear to contain factual descriptions of "recent events" or "new information of interest to the recipients" and meet the test of being "newsworthy". Without evaluating their accuracy, there is little if any editorializing or indication of use for personal objectives. Mr. Werner states that there

is no editorial page as his focus is on reporting news rather than expressing opinions. The letters to the editor demonstrate that at least some recipients find the articles to be relevant and helpful in keeping them informed or informing the public. See e.g. Treena Johnson, National Weather Service (article informing public about sneaker waves); Richard King (praising coverage of local sports.) Other indicia of institutional media include such traditional news items as obituaries, notices of public meetings or events and weather reports.

Mr. Werner reports that he has one paid staff person, Justin Fossum. He serves as "Executive Editor" and has extensive experience working as a journalist for traditional news media. Mr. Werner reports that all stories are written and edited in-house except for press or media releases. Those may be published as submitted but only after review such as for conformance with AP style guidelines. Mr. Werner is the primary photographer although he accepts photos submitted by local residents, such as for sporting events. He employs no "stringers".

The Oregon Court of Appeals consistently has stated that it must analyze "the coverage of the [Public Records and Meetings] act broadly and its exemptions narrowly." *Handy, supra.* Executive sessions are an exception to the statutory policy requiring "an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made." ORS 192.620.

Given this direction and applying the factors set forth by the Attorney General to the facts outlined above, it is very likely that Lincoln City Homepage qualifies as institutional news media.

Mr. Werner states that only he or Mr. Fossum currently are authorized to attend executive sessions as representatives of Lincoln City Homepage. The Attorney General states, and I concur, that local governments may require credentials to the extent needed to reasonably indicate that the person has a formal affiliation with and is acting as a representative of Lincoln City Homepage. This contrasts with a casual "volunteer".

Although perhaps somewhat beyond the scope of this assignment, I think it important to reiterate that the Attorney General Opinion is not binding. In particular, I think her conclusion that public bodies have no remedy to enforce their authority to "require" non-disclosure of information is questionable. Nothing in my recommendation is intended to suggest that the city cannot or should not take steps to enforce non-disclosure after consulting with counsel. I do, however, suggest that the city explicitly include the non-disclosure requirement in its notice of executive sessions and consider reiterating it at the conclusion of each executive session.

Please let me know if you have questions regarding this recommendation.

cc. Richard Appicello, City Attorney

