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August 12, 2002

Mel Stewart
5180 Zosel Avenue S.
Salem, OR 97306

Re: *Petition for Review of Denial of Fee Waiver:*
Division of State Lands

Dear Mr. Stewart:

This letter is the Attorney General's order on your petition for review of the Division of State Lands' (Division) denial of your request for a waiver of fees under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on August 5, 2002, states that the Division denied your request to waive "fees both past, current and future." For the reasons that follow, we deny your petition.

Background

Neither your petition nor the attached July 26th letter to the Division requesting the waiver describes either the records or fees at issue. The Division has provided us with a copy of its letter to you dated August 2, 2002, which responds to your request for a fee waiver. That letter indicates that the only public records request you have pending with the Division is for copying the contents of a particular permit application file. The Division estimates that the cost of providing a copy of that file would be $135.40 (532 pages of copying charges, plus two hours of staff time to remove the records from the file, review them for any privileged information, do the copying and return the records to the file).

Steve Purchase, the Division's Assistant Director for Field Operations, informs us that you have made a number of public records requests over the past several years, each of which has been completed and paid for. From our work with the Division, we also know that it recently completed a very large document production in a contested case hearing at the request of your attorney, John Shonkwiler. The Division billed

Mr. Shonkwiler $11,342 for that production, but (after a dispute over calculation of costs) Mr. Shonkwiler and this office recently reached a compromise. Mr. Shonkwiler has sent a check to the Division for $7,456 and, during a prehearing conference call before a hearing officer on July 23, 2002, Mr. Shonkwiler promised to pay an additional $2,000. While there is a handwritten note on the bottom of your petition stating that "we would also like the A.G. to address the $11,000 previously billed," in light of the compromise and the payment to date, we find there is no $11,000 charge pending at this time.

Because you have only one outstanding public records request with the Division, we limit our order to the estimated fee of $135.40 associate with that requested.[1]

Reasonableness of the Division's denial

The Public Records Law authorizes a public body to waive or reduce fees if the public body "determines that the waiver or reduction of fees is in the public interest because making the records available primarily benefits the general public." ORS 192.440(4). The burden to establish that a waiver is in the public interest rests on the requestor. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2001) (AG'S MANUAL) at 16. To determine whether a waiver of fees is in the public interest, a public body may consider the following factors:

> the requestor's identity, the purpose for which the requestor intends to use the information, the character of the information, whether the requested information is already in the public domain, and whether the requestor can demonstrate the ability to disseminate the information to the public.[2]

Id. at 16. In relation to the requestor's purpose in asking for the records, the AG'S MANUAL states that "[b]ecause the proper focus must be on the benefit to the public, a personal benefit to be derived by the requestor alone is insufficient to require a fee waiver." *Id.* at 17.

It does not appear that your records request satisfies the public interest test in this instance. In your July 26th letter to the Division you state that your request for a waiver "is based upon the public interest of the Oregon Legislature getting truthful and accurate information." The letter also explains that you are in the process of requesting "new legislative limitations currently in the hands of legislative counsel and sponsored by Senate President Gene Derfler." According to Mr. Purchase, you have explained to

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[1] Because the public interest test turns on the facts of each particular public records request, we cannot address your request for waiver of "future" fees in this order. Should you request a waiver of fees as to a particular records request in the future and the Division denies that request, you would be entitled to file a new petition concerning that denial.

[2] The AG'S MANUAL states that "[t]he requestor's inability to pay is also a factor, but is not alone a sufficient basis for a fee waiver." AG'S MANUAL at 16.

Division staff members that the purpose of your pursuit of new legislation is related to your effort to resist having to obtain a state removal-fill permit to develop a wetland on your Corvallis property. This goal makes your request for records appear to have as its focus a private, as opposed to public, interest. While it is possible that providing you records to support your legislative efforts may serve some public interest, we cannot reach that conclusion on the basis of the information that you have provided.

Conclusion

Because your request does not establish that making the records available would benefit the public's interests, as opposed to your personal interests, we deny your petition for an order requiring the Division to waive the $135.40 fee for production of the records you recently requested.[3]

Sincerely,

Peter D. Shepherd

PETER D. SHEPHERD
Deputy Attorney General

AGS10788
c: Steve Purchase, Division of State Lands

[3] You state in your letter to the Division that it has been charging you "amounts in excess of the amounts allowed by statute." The Public Records Law authorizes a public body to establish fees "reasonably calculated to reimburse it for its actual cost in making such records available." ORS 192.440(3). The Public Records Law does not authorize a requestor to petition the Attorney General to review the fees that an agency establishes, nor does it authorize the Attorney General to determine whether an agency's fees represent its actual costs. AG'S MANUAL at 14-15.