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March 27, 2002

Sent by FAX (503) 370-8649
Leslie I. Zaitz
Staff Writer, *The Oregonian*
Press Room
Capital Building
Salem, OR 97310

Re: *Petition for Review of Denial of Fee Waiver:*
Oregon Department of Education Records

Dear Mr. Zaitz:

This letter is the Attorney General's order on your petition for review of the Department of Education's (ODE) 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 March 19, 2002, states that ODE's denial was unreasonable.[1] For the reasons below, we respectfully deny your petition.

1. Background

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. The law also authorizes a public body to establish fees "reasonably calculated to reimburse it for its actual cost in making records available." ORS 192.440(2). ODE has adopted an administrative rule regarding such fees, which provides for charges for copying and staff time. OAR 581-001-0105. Although ODE did not do so in this case, the Public Records Law would have permitted the agency to require payment of fees in advance. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2001) (AG'S MANUAL) at 14.

Your petition states that *The Oregonian* initiated an investigation in early 2001 into ODE and Superintendent of Public Instruction, Stan Bunn. According to your petition, you were trying to determine whether there had been financial mismanagement of the agency by its top executives and whether Mr. Bunn had engaged in unethical conduct while in office. During

[1] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

2001, beginning on March 19, you filed a series of 19 public record requests with ODE in relation to this investigation.

By letter dated April 2, 2001, Chris Durham, then-Director of Management Services for ODE, told you that ODE would waive its fees for providing you with records responsive to your March 19 and 20 and April 2 records requests.[2] Durham's letter also stated that ODE would charge *The Oregonian* "for any additional copies that you may request in accordance with OAR 581-001-0105." Under ODE's administrative rule, ODE may charge a 25 cents per page copying fee as well as a fee "reasonably calculated to provide reimbursement for costs incurred in locating, compiling, editing or otherwise processing" records in response to a public records request. Durham's letter stated that ODE would charge *The Oregonian* fees both for copying and for reasonable reimbursement of other costs. In an email that you sent to ODE, dated May 24, 2001, containing your seventh request for records, you state "[a]s per our existing agreement, please add the costs for these copies to the open invoice you are maintaining for your public records charges to *The Oregonian*."

Your petition states that ODE has submitted invoices to *The Oregonian* totaling $566.50 for 2,266 pages of material, and that *The Oregonian* has already paid three invoices totaling $259.50. Your petition asks this office to order ODE to "fulfill its waiver offer" as stated in Mr. Durham's letter, quoted above, and refund any amounts paid for those pages and to "waive the balance of pending or paid fees."

According to Mark Hunt, ODE Human Resource Director, during the period of March 19 through June 11, 2001, ODE provided you with copies of 2,266 pages of materials in response to 11 of your 19 public records requests.[3] The records ODE provided in response to the two requests for which it offered to waive fees numbered 730 pages, and Mr. Hunt has confirmed that ODE will waive the $182.50 in copying charges for those pages. Thus, what is at issue is a total of 1536 pages. The copying fee for these remaining pages, at 25 cents per page, is $384, towards which *The Oregonian* has paid $259.50.

Your petition recites that the documents produced in response to your request "provided critical information about how the agency was being managed, how public money was being used, and how public officials in charge of the agency were discharging their public duties." Petition at 2. You follow this observation with a series of impacts that you attribute to the results of your investigative work. Petition at 2 - 3.

2. Waiver or Reduction of Fees

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 record available primarily benefits the general public." ORS 192.440(4). The burden to establish

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[2] Despite Mr. Durham's reference to three requests, consistent with your petition ODE's records show that you made two requests, one on March 19 and another on April 2.

[3] Although ODE may have provided you with copies of additional records in response to requests received between June 12 and October 17, 2001, ODE has charged copying fees only for those records provided through June 11.

that a waiver is in the public interest rests on the requestor. AG'S MANUAL at 16. Finding the public interest test satisfied in this instance, ODE has agreed to waive $182.50 in copying charges for 730 pages of the materials it provided to you. In addition, ODE is not charging *The Oregonian* fees for costs incurred in locating, compiling, editing and otherwise processing records in response to your requests. Considering the copying charges alone, ODE has already reduced its fees by over 32 percent for providing you with 2,266 pages of records.

But ORS 192.440(4) does not require an agency to grant a complete fee waiver even if the public interest test is met. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2001) (AG'S MANUAL) at 17. Even if the public interest standard is met, an agency has discretion to insist on the payment of fees, so long as it acts reasonably in making its determination. AG'S MANUAL at 18. The manual describes factors that will be applied on a case-by-case basis to ascertain whether the denial of a waiver is unreasonable. AG'S MANUAL at 18. These factors include:

> any financial hardship on the public body, the extent of time and expense and the interference with the business of the public body, the volume of the records requested, the necessity to segregate exempt from non-exempt materials, and the extent to which an inspection of the records is insufficient for the public interest or for the particular needs of the requestor.

AG'S MANUAL at 18. Before examining each of these factors in turn, we emphasize that we review the agency's fee-waiver decision for the purpose of determining whether it was reasoned. The agency may not act arbitrarily or capriciously, but we cannot overturn an agency decision that comports with a reasoned assessment of the relevant factors. The question for the Attorney General is not whether a different agency would have reached a different determination on the same facts. Instead, the issue is whether the totality of the circumstances indicate that the decision reached by ODE in this instance was reasonable.

The fact that we are testing the reasonableness of the agency determination makes it relevant to observe at the outset that this is not a case in which an agency denied the *totality* of a fee-waiver request. Instead, the agency waived some fees, produced the records without insisting on advance payment, and now insists on payment for the costs of producing only some of the requested records. As your petition indicates, you did obtain records that served the public interest, and, therefore, this is not a case in which an agency's insistence on payment defeats the underlying purpose of the public records law.

a. Financial Hardship

ODE acknowledges that it has waived $182.50 out of $566.50 in copying fees and is requiring *The Oregonian* to pay the remaining $384. The waiver of $384 would not constitute a financial hardship on ODE.

b. Time, Expense & Interference with ODE Business

You made 19 records request during 2001 that, according to ODE, involved numerous categories of records. In some instances the requests resulted in no records being identified for disclosure and, on some occasions, staff were present while you inspected original records. Due to the nature of some of the requested records, it was sometimes necessary for management-level personnel to identify and review records responsive to your requests. ODE considered this factor in evaluating your fee waiver request, and this factor tends to support the reasonableness of the agency's decision.

c. Volume of Records

As stated above, ODE provided you with 2,266 pages of records, which we find to be a substantial amount. Again, ODE considered this factor in evaluating your fee waiver request. And again, this factor tends to support the reasonableness of the agency's decision.

d. Segregation of Exempt Records

While it was necessary for ODE staff to segregate information in some responsive records, according to Mr. Hunt segregation was not a predominate part of the agency's records inspection and production.

e. Insufficient for the Public Interest

This factor tests whether copying was required to serve the public interest, or whether inspection alone would have been sufficient. If the public interest could not have been served by simple inspection, then it would be less reasonable for the agency to deny the waiver request. If the public interest could have been served as well by simple inspection, then the agency's determination to be reimbursed for the cost of copying is more likely to have been reasonable.

The petition provides little information concerning this factor. There are some facts that suggest the necessity of photocopying. "Cell phone and office phone invoices" were among the records duplicated in response to your requests. Petition at 2. Such records generally do not include sufficient information to identify the recipient of the listed calls; with respect to such records, simple inspection would not have been sufficient. The volume of documents produced also tends to support the conclusion that photocopying was appropriate. But beyond this, your petition does not establish a basis from which the agency would have been compelled, in the exercise of a reasonable decision-making process, to conclude that photocopying was required.

We cannot say that the agency's denial of your fee-waiver request was unreasonable under all of the circumstances under which it was made.

3. Billing Practices.

According to your petition, ODE submitted three invoices to *The Oregonian* between April 26, 2001 and October 17, 2001. The petition states that these invoices were not sent directly to you, but were instead sent to "The Oregonian with no notice directly to me as the

requestor." Petition at 2. A fourth invoice was submitted on February 13, 2002. You assert that by this course of conduct, the agency "in essence granted a fee waiver . . . ." Petition at 3.

The Public Records Law permits the agency to demand fees before any records are produced, but it does not establish a date by which demand for reimbursement must be made by the agency for records that have already been produced. We need not decide in this case whether an agency ever could be barred by some principle of law from collecting fees. Your investigation included 19 requests made between March and October 2001. Developments related to your investigation "continue to this day." Petition at 2. The fact that the agency submitted four invoices during the course of your investigation, the last separated by some months from the preceding invoice, simply does not violate any provision of the Public Records Law.

4. Conclusion

Although some of the considerations described above are inconclusive or weigh against the reasonableness of ODE's determination, the other factors persuade us that ODE has not acted unreasonably. It did not charge *The Oregonian* any fees for locating, compiling, editing, or otherwise processing the requested records, and has waived the 25 cent per page cost for 730 pages out of 2,266 pages produced. It did not insist on payment in advance. In light of the volume of records produced and the time spent by ODE personnel to respond to your requests, we find that ODE's decision to reduce its copying fees by over 32 percent, leaving *The Oregonian* with a total charge of $384, is not unreasonable. Therefore, we deny your petition for an order requiring ODE to waive (and refund) the $259.50 in fees already paid by *The Oregonian*, and to waive pending fees in the amount of $124.50.

Sincerely,

Peter D. Shepherd

PETER D. SHEPHERD
Deputy Attorney General

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c: Mark Hunt, ODE