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October 31, 2001

William Miller
Assistant Metro Editor
Seattle Post-Intelligencer
101 Elliott Avenue W
Seattle, WA 98119

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

Dear Mr. Miller:

This letter is my order on your petition for review of the Department of Education's (ODE) denial of your request for waiver of fees under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which was received on October 24, 2001, states that ODE's denial was unreasonable. For the reasons below, I 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 such a rule, which includes charges for copying and staff time. OAR 581-001-0105. A public body may preliminarily estimate charges for responding to a records request and require prepayment of estimated charges in advance of producing records. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1999) (MANUAL) at 12.

Materials included with your petition state that the Seattle Post-Intelligencer (Post-Intelligencer) is investigating patterns of sexual abuse at the Washington State School for the Deaf, as well as the school's reports of, and response to, incidents of such abuse. For purposes of comparison, the Post-Intelligencer requested records from the Oregon School for the Deaf regarding instances of sexual abuse. The Oregon School for the Deaf and ODE, the state agency of which the school is a part, have responded to the request by providing relevant records for the 2000-2001 school year. ODE charged the Post-Intelligencer $1,523.74, for providing the

records, explaining that this figure did not include full charges for labor costs. At the Post-Intelligencer's request, ODE waived all but $50.00 of the charges.

On September 18, 2001, the Post-Intelligencer requested additional records, for school years from September 1995 to September 2000, and also requested a waiver of all fees beyond $100. ODE denied the Post-Intelligencer's request for a waiver of fees. ODE notified the Post-Intelligencer of an estimated cost of $1,150 to provide the requested records for the 1999-2000 school year and agreed to begin assembling the records upon receipt of payment. ODE also explained that it anticipated the cost of providing records from prior years would be higher, due to the need to have staff, authorized to review confidential records, search individual student files.

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). A public body may waive or reduce fees only if it determines that doing so would serve the public interest. Relevant factors for making this determination include:

> [T]he requester's identity, the purpose for which the requester intends to use the information, the character of the information, whether the requested information is already in the public domain, and whether the requester can demonstrate the ability to disseminate the information to the public.

MANUAL at 14-15. A waiver or reduction of fees to provide records to the Post-Intelligencer would serve the public interest in this instance. The subject that the newspaper is investigating and its ability to disseminate information to the public both lead to this conclusion. However, a waiver or reduction of fees serving the public interest means only that ODE is *authorized* to waive or reduce fees. The decision whether to waive or reduce fees remains within ODE's discretion, although it must act reasonably in making its determination. MANUAL at 16. A person believing that a public body has unreasonably denied a request for a waiver or reduction of fees may petition the Attorney General. ORS 192.440(5). In this case, the issue for the Attorney General's office to determine is whether ODE's denial of the Post-Intelligencer's request to waive all fees above $100 for providing requested records for school years from September 1995 to September 2000 was unreasonable.

Under the Public Records Law, a public body may reasonably deny a request for waiver or reduction of fees if certain factors warrant a denial. These factors include:

> [A]ny financial hardship on the public body, the extent of time and expense and 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.

MANUAL at 16. We consider each of these factors in determining the reasonableness of ODE's denial.

a. Financial Hardship

With respect to financial hardship, it cost ODE in excess of $1,500 to provide the Post-Intelligencer with records for the 2000-2001 school year. ODE waived all of its costs beyond $50. ODE has estimated charges to provide records for the 1999-2000 school year at $1,150, and higher charges for each of the four preceding school years for which records are requested. In sum, for school years ranging from 1995 to 2001, the Post-Intelligencer is requesting ODE to waive fees in excess of $7,250. As stated, ODE already has waived over $1,450 in fees. Especially in the current period of economic slowdown and budgetary concerns,[1] it is not unreasonable for ODE to act cautiously on matters that impact its finances.

b. Volume of Records, Time, Expense, & Interference with ODE Business

To identify and review records for the 2000-2001 school year, which were centrally located, required approximately 50 hours of labor. ODE estimates that it will require a similar number of hours to provide records for the 1999-2000 school year. August 7, 2001 Letter to Ruth Teichroeb, Post-Intelligencer Reporter, from Dawn Billings, ODE Director, Office of Curriculum, Instruction and Field Services. Identifying and reviewing responsive records for each of the four school years prior to 1999-2000, however, will require a greater number of hours due to potentially responsive records being disbursed among individual student files. To identify responsive records will require ODE personnel to search all student records for the requested period, even though the vast majority of records will not contain information responsive to the request. This means that it will be necessary for ODE personnel to hand search tens of thousands of documents. In addition, ODE personnel will need to review responsive records to segregate exempt from nonexempt material. ODE anticipates that it will need to consult with legal counsel in conducting its review. Also, ODE must use personnel authorized to review confidential records to identify and review responsive records. Qualified personnel are, for the most part, management level employees. Responding to the Post-Intelligencer's request will draw them away from their regular responsibilities.

ODE will incur a burden in terms of both time and expense by responding to the Post-Intelligencer's request. Also, because of the anticipated time commitment, Jane Mulholland, Director of the Oregon School for the Deaf, has stated that responding to the Post-Intelligencer's request will interfere with normal activities.

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[1] "Forecasts released in September showed a $290 million projected decrease in state revenues and the forecast scheduled for release December 1 is expected to show further declines." October 5, 2001, Press Release from Office of Oregon Governor John Kitzhaber. <http://www.governor.state.or.us/governor/press/p011005.htm>. According to Dave Fajer, ODE Director of Management Services, Governor Kitzhaber has directed ODE, along with other state agencies, to identify administrative and program cuts of up to 10% of its current budget.

c. Segregation

The requested information is maintained within student education records that are subject to strict requirements of confidentiality. Without student or parental consent, information within student education records may be either completely or partially exempt from disclosure. ORS 192.502(8), (9); 326.565; 336.187; 20 USC § 1232g; and OAR 581-021-0220-0040. An additional requirement for confidentiality relevant for abuse reporting records is contained in ORS 419B.035. Overall, the nature of the requested records necessitates extensive review and redaction prior to disclosure.

d. Insufficient for the Public Interest

In the request to ODE for a waiver of the fees associated with the production of records for the 2000-2001 school year, the Post-Intelligencer described the focus of its investigation as being the Washington State School for the Deaf, and that the newspaper wanted to review information from Oregon and other states to compare Washington's experience. In other words, information regarding the Oregon School for the Deaf is subsidiary to the focus of the newspaper's research. ODE has provided the Post-Intelligencer with records from the most recent school year, waiving approximately $1,500 in fees in doing so. Therefore, ODE has provided the newspaper with a means by which to compare Washington's experience with Oregon's. While access to additional records from previous years may enhance that comparison, ODE cannot estimate the degree to which it would do so. In other words, it is difficult to ascertain the extent to which the public interest would be served by ODE providing the Post-Intelligencer with additional records.

3. Conclusion

Satisfying the public interest test does not entitle a requestor, as a matter of law, to a complete fee waiver. In total, the Post-Intelligencer has requested records for a period of six school years. ODE already has provided records for one of those years, waiving all but $50.00 in fees when the cost to provide the records was in excess of $1500.00. In light of this existing waiver, and given the time and expense, the volume of records, and the necessity to segregate exempt from non-exempt records in order for ODE to provide records for the remaining five school years, I conclude that ODE's denial of the Post-Intelligencer's request for a further fee waiver was not "unreasonable."

For these reasons, I respectfully deny your petition for complete waiver or substantial reduction of fees.

Sincerely,

HARDY MYERS
Attorney General

AGS08933
c: Jane Mulholland, Director of the Oregon School for the Deaf