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March 29, 2000

Mr. Steve Mayes
THE OREGONIAN
1320 S.W. Broadway
Portland, Oregon 97201

Re: *Petition for Review of Fee and Denial of Fee Waiver*
Oregon Blueberry Commission
Oregon Mint Commission
Oregon Highland Bentgrass Commission
Oregon Ryegrass Commission

Dear Mr. Mayes:

This letter is the Attorney General's order on your petition for review of the fees imposed by the Oregon Blueberry Commission, the Oregon Mint Commission, the Oregon Highland Bentgrass Commission, and the Oregon Ryegrass Commission (hereinafter referred to collectively as "the commissions") for requested records and of the commissions' denial of your request to waive the fee under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition asks the Attorney General either to order the commissions to provide the records at their actual cost and to provide a written explanation and justification of the charges, or to order the commissions to provide the records and waive the fee. For the reasons below, we respectfully deny your petition.

1. Background

In October 1999, you requested the commissions to provide you with the names and addresses of all persons, organizations or corporate entities that file a report with or pay an assessment to the commodity commissions. This request, as you later clarified, specifically was intended to obtain the names and addresses of people that no longer would be subject to direct disclosure as of the effective date of Senate Bill 230, adopted by the 1999 legislature. Or Laws 1999, ch 380. Senate Bill 230, codified at ORS 192.501(25), conditionally exempts from disclosure "[r]ecords of the name and address of a person who files a report with or pays an

assessment to a counsel, board or commission created or organized under ORS chapter 576." This conditional exemption applies to both producers of a commodity and first purchasers or handlers.[1/]

The commissions agreed to supply the requested information to you upon payment of $50 for each list. Each of the commissions denied your request for a waiver of the $50 fee. You have contested the amount of the fee charged by the commissions and the denial of your request for a waiver, contending that the fee is excessive, particularly in light of the fact that three of the commissions provide the names and addresses of their handlers on their web sites.

2. Amount of Fee

The Public Records Law confers a right to access to any public record of a public body in Oregon, subject to certain exemptions and limitations and subject to fees imposed by the public body for the cost of providing the record. ORS 192.420. Any fee imposed by a public body must be "reasonably calculated to reimburse it for its actual cost in making such records available including costs for summarizing, compiling or tailoring such record, either in organization or media, to meet the person's request." ORS 192.440(3). Bryan Ostlund, the commissions' Administrator, informs us that $50 is the fee established by the commissions for production of the requested list and that it is the actual cost of each commission's providing those records.

The Public Records Law contains two specific provisions for petitioning the Attorney General. ORS 192.450(1) provides that "any person denied the right to inspect or receive a copy of any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from public inspection." ORS 192.440(5) provides that "a person who believes that there has been an unreasonable denial of a fee waiver or fee reduction may petition the Attorney General * * * in the same manner" as for the denial of a record. There is no provision authorizing a person to petition the Attorney General to review an agency's fees established under ORS 192.440(3). Moreover, although ORS 192.470(2) requires an agency to provide to the Attorney General a copy of the records that are the subject of the petition so that the Attorney General may determine whether those records should be made

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[1/] ORS 576.051 defines the terms "first purchaser," "handler" and "producer" as follows:

(6) "First purchaser" means any person who buys the commodity for which a commission is created from the producer in the first instance, or handler who received the commodity in the first instance from the producer for resale or processing.

(7) "Handler" means any producer, processor, distributor or other person engaged in the handling or marketing of or dealing in the commodity for which a commission is created, whether as an owner, agent, employee, broker or otherwise.

(8) "Producer" means a person producing within this state or procuring within the state, its rivers or the off shore waters, but not the Columbia River, for commercial handling within the state, a commodity for market, or receiving a share thereof as landowner, landlord, tenant, sharecropper, boat skipper or otherwise.

available for inspection, no provision requires an agency to provide to the Attorney General, or authorizes the Attorney General to demand, the financial or other data that justifies the agencies fees. Without such information, the Attorney General has no basis for determining whether those fees represent the agency's actual costs.

We conclude therefore that the Public Records Law does not give the Attorney General the authority to review the fees charged by a state agency and to determine whether or not those fees in fact represent the agency's actual cost of making the records available. *Cf.* Public Records Order, February 6, 1995, Pittman (denying for lack of jurisdiction a petition seeking disclosure without payment of fee). Accordingly, to the extent that your petition requests this office to order the commissions to provide a written explanation and justification of their charges for the records, or requests this office to determine the commissions' actual cost of providing those records and to order the commissions to provide the records to you for that amount, we deny your petition for lack of jurisdiction.

3. Fee Waiver

An agency that has established fees for public records requests may "furnish copies without charge * * * if the custodian determines that the waiver * * * of fees is in the public interest because making the record available primarily benefits the general public." ORS 192.440(4). A person who believes that there has been an unreasonable denial of a fee waiver may petition the Attorney General for review of the denial. ORS 192.440(5). ORS 192.440(5) does not require a fee waiver, but places the discretion to make this decision with the agency. In reviewing an agency's exercise of that discretion, we consider: a) whether a waiver is prohibited by law, b) whether the "public interest" test is met, and c) whether the agency's decision was "unreasonable." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETING MANUAL (1999) (MANUAL) at 13. Public Records Order, March 10, 2000, Suo and Mayes; Public Records Order, November 10, 1994, Pittman; Public Records Order May 19, 1993, Smith.

a. Waiver Prohibition

Although ORS 192.440(4) allows a public body to waive its fees for furnishing public records when it determines that it is in the public interest to do so, some public bodies cannot waive fees for making records available even if the provisions of ORS 192.404(4) are met. If a public body's sole funding for a particular program is from funds that are constitutionally, statutorily or otherwise legally dedicated, the public body in responding to a public records request, may not charge fees that are lower than its actual costs. The commissions are organized and operate pursuant to ORS chapter 576. We do not believe that the provisions therein prohibit the commissions from waiving or reducing fees for a public records request.

b. "Public-Interest" Test

The next question is whether waiver of the fee is in the public interest. A state agency may waive fees for a public records request if making the records available primarily benefits the general public. Factors to consider under the public interest test include the requestor's identify,

the purpose for which the information will be used, the nature of the information, whether the information already is in the public domain, and whether the requestor can demonstrate the ability to disseminate the information to the public. The requestor's ability to pay also is a factor but alone is not sufficient to deny a fee waiver. MANUAL at 14-15.

You have stated that you are working on an article about the commodity commissions.[2/] The public has an interest in the operation of state government, including the commodity commissions. We have no doubt of your ability, as a reporter for THE OREGONIAN, to disseminate the information to the public.

c. Reasonableness of Decision to Deny Fee Waiver

The third question in the fee waiver analysis is whether the denial of the waiver request was unreasonable. The reasonableness inquiry is informed by the following factors: the 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 for the particular needs of the requestor. MANUAL at 16.

Mr. Ostlund has informed us that responding to your public records request will require a significant amount of time for the small contract staff that works for the commissions. The records that you have requested are not in a readily available format. For each commission, it will be necessary to generate a list of producers and first purchasers from the general mailing list database for that commission.[3/] The financial hardship to the commissions of waiving their fees for providing the records to you must be considered in light of the fact that the four commissions are small agencies that operate on small budgets.

As noted above, the Public Records Law does not mandate a fee waiver; instead it makes the decision to waive fees discretionary with the agency. Public Records Order, December 12, 1995, Pecknold. Moreover, the media is not automatically entitled to a fee waiver. *See* Public Records Order May 19, 1993, Smith (citing House Floor Debate on HB 2571, Tape 17, side 2, 368-374, April 27, 1989) (stating that it is important to make it clear that the waiver provision does not give the news media the ability to ask for anything it wants and have it provided for free). We have no basis for concluding that THE OREGONIAN does not have the financial ability to pay the fees charged by the commodity commissions, which amount to a combined total of $200.

[2/] You have also indicated that a reason for your request is to obtain information that no longer will be subject to direct disclosure as a result of Senate Bill 230. This reason alone does not satisfy the public interest test.

[3/] As you note, the handler lists of three of the commissions are already available.

Given all of these factors, we conclude that the commissions' refusal to waive the $50 fee for the list of producers was not "unreasonable." Accordingly, we deny your petition to the extent it requests this office to order the commissions to waive the fees.[4/]

Sincerely,

for DAVID SCHUMAN
Deputy Attorney General

AGS04475
c: Bryan Ostlund, Administrator

[4/] You have requested a complete fee waiver. Mr. Ostlund informs us that the commissions might consider a reduction in their fees.