JOHN R. KROGER
ATTORNEY GENERAL

MARY H. WILLIAMS
DEPUTY ATTORNEY GENERAL



DEPARTMENT OF JUSTICE
1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400

September 11, 2009

SENT VIA REGULAR MAIL & EMAIL

Mr. Paul Wright, Editor
Prison Legal News
c/o
Daniel Manville, General Counsel
Human Rights Defense Center
Post Office Box 20321
Ferndale, Michigan 48220
(daniel.manville@gmail.com)

Re: Petition for Review of Denial of Fee Waiver
Department of Administrative Services, Risk Management Unit Records

Dear Mr. Wright:

This letter is the Attorney General's order on your petition for review of the denial by the Department of Administrative Services, Risk Management Unit (Risk Management) of your request for a waiver of fees under the Public Records Law, ORS 192.410 to 192.505. Your petition, which was received on August 31, 2009, asserts that Risk Management abused its discretion by denying your request for a complete fee waiver, Petition at 2-5 and by offering a fee reduction that you believe is insubstantial, Petition at 5-6. You also assert that Risk Management's fee estimate was not reasonably calculated. Petition at 6-7. For the reasons that follow, we respectfully deny your petition.

Background

The Public Records Law confers a right to inspect any public records 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(4). "The custodian of any public record may furnish copies without charge or at a substantially reduced fee if the custodian 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(5). However, even if a public body

determines that waiving fees is in the public interest, "the decision to waive or reduce fees is discretionary with the public body, although it must act reasonably." ATTORNEY GENERAL'S PUBLIC RECORDS AND PUBLIC MEETINGS MANUAL (MANUAL) at 20, citing ***In Defense of Animals v. Oregon Health Sciences University***, 199 Or App 160, 189-90, 112 P3d 336 (2005). Under ORS 192.440(6), "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 a person petitions when inspection of a public record is denied."

You initially requested records from Risk Management by a letter dated February 5, 2009:

> I am requesting on behalf of *Prison Legal News* public records containing details about any claims, settlements, or verdicts against the State of Oregon for $1000.00 or more involving the Department of Corrections (DOC), its employees or agents, or any of its facilities. For each payment made, please include a copy of the tort claim or complaint, or any other document that discloses the facts underlying the incident leading to the settlement or verdict. Also include any settlement agreement, general release, verdict, or court order obligating the county to pay the claimant or plaintiff. Finally, please include a copy of the check paid to the claimant or plaintiff.
>
> The time period for the above request is from January 1, 2001 through December 31, 2008.

You also requested a total waiver of any fees associated with providing the requested records to you. On April 22, 2009, Risk Management responded to your request and estimated its costs in providing the requested records to you at $3899.50. On March 24, 2009, you responded and asked Risk Management to indicate whether it would waive all fees associated with producing the requested records.

On May 15, 2009, Andrea Peters, a Risk Analyst for Risk Management, responded in writing. She indicated that there are thousands of pages contained in 69 files that are responsive to your request. Risk Management denied your request for a total fee waiver, but agreed to a partial fee waiver as follows:

> [Risk Management] denies your request for a complete fee waiver. However, on further review of this matter, and taking into account the relevant factors and [Risk Management]'s ability to scan the information into electronic PDF format, DAS has determined that it will not charge a photocopy fee, and will also grant a 25% reduction of the [Risk Management] portion of the estimated fee relating to your records request. [Risk Management] previously estimated the costs of providing the requested records at $3,899.50. Of that amount, $1379.50 were [Risk Management] costs. After deleting the photocopying charge of $379.50, and applying a 25% reduction to the remaining [Risk Management] costs, [Risk Management]'s cost are reduced from $1379.50 to $750.00. Because the cost of legal review is a fixed cost incurred by [Risk Management], [Risk Management]

> declines to reduce this portion of its cost estimate. Accordingly, the new estimated fee for providing the records you seek is $3270.00

In other words, Risk Management effectively waived $250.00 of its $3520 fee.

Analysis

Your petition asks the Attorney General to order Risk Management to waive the entirety of its fee, or more of its fee, based on the three arguments described above. We begin by addressing your argument that Risk Management did not reasonably calculate its fee. We then proceed to your argument that Risk Management abused its discretion in denying your request for a complete waiver. Finally, we address your claim that the waiver Risk Management offered you was not sufficiently "substantial."

1. Risk Management's Fee Estimate

In general, the Attorney General does not have authority to review the reasonableness of an agency's public records fees, or determine whether those fees accurately reflect the actual cost to the agency of providing access to its public records. MANUAL at 16-17. The Attorney General's authority to enforce the inspection provisions of the Public Records Law may require the Attorney General to review a fee that appears to be grossly excessive under circumstances suggesting that the true purpose of the fee is to deny access to records. Public Records Order, March 23, 2009, Kellington at 4. Such circumstances are lacking here.

First, Risk Management informs us that your request reaches thousands of pages of documents contained within at least 69 files. Risk Management also confirmed to us what Ms. Peters told you in her May 15, 2009 letter, namely that "[Risk Management] anticipates that support staff will need to copy responsive records, and that authorized personnel, *i.e.* management level employees, will need to review confidential records in order to identify and review responsive records, taking support staff and managerial personnel away from their regular responsibilities." In short, responding to your records request will require a significant expenditure on the part of Risk Management, and the fee estimate reflects that fact.

Moreover, the records that you seek involve liability claims against the state as to which Risk Management almost certainly received legal advice. Consequently, Risk Management legitimately perceives a need to review the responsive documents in order to identify and remove privileged or otherwise exempt materials.

In light of these realities, we cannot say that Risk Management's estimated fee appears to be grossly excessive or that circumstances suggest the true purpose of the fee is to deny access to the records. As a result, we will not evaluate further your contention that Risk Management did not reasonably calculate its fee.

2. Risk Management's Refusal to Waive its Fee

We next address your contention that Risk Management abused its discretion when it refused to waive the entirety of its public records fee. As we state above, ORS 192.440(5) provides that records custodians "may furnish copies without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public."

Under this statute, a threshold question is whether "the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public." In Ms. Peters' May 15, 2009 letter to you, Risk Management acknowledged that "[a] waiver or reduction of fees to provide records to the Prison Legal News arguably would serve the public interest." The letter noted that "Prison Legal News is dedicated to disseminating information to the public concerning criminal justice issues, including actions against state corrections divisions." Consistent with Risk Management's assessment, we assume that waiving Risk Management's fees would serve the public's interest because making the records available would "primarily benefit[] the general public."

However, that conclusion does not mean that Risk Management was required to waive or reduce its fees. According to the Court of Appeals:

> [E]ven if the public body determines that the requestor meets [the public interest] test, the public body is not required to grant the fee waiver or reduction. Rather, it "may" do so; that is, the public body has discretion whether or not to grant a fee waiver or reduction.

In Defense of Animals, 199 Or App at 189. In exercising that discretion, "the public body's decision whether to grant or deny a fee waiver or reduction must be reasonable." *Id.*

To determine whether Risk Management's decision with respect to your waiver request was reasonable, we must "examine the totality of the circumstances presented." *Id.* at 189-190. Your petition argues that the factors weighed by Risk Management in Ms. Peters' May 15, 2009 letter to you are erroneous because they "focus not on the public's right to access records, but rather on [Risk Management's] own financial and administrative concerns." Petition at 4. Ms. Peterson's letter cites to and quotes from the factors listed in the MANUAL at page 21. You prefer the "criteria suggested by [the] plaintiff [in ***In Defense of Animals***] but not expressly adopted by the court" because you believe that those "more accurately reflect the public policy considerations underlying the [Public Records Law]." Petition at 4. You appear to be referring to the following passage:

> Relying in part on the [MANUAL], plaintiff asserts that the proper criteria for granting or denying a request for a fee waiver or reduction include the identity of the requestor, its ability to pay the assessed fees, the purpose for which the requestor is seeking the information in the records, the character of the information, whether the information is already available to the public, and whether the requestor can demonstrate the ability to disseminate the information

> to the public. Plaintiff also asserts that, consistently with decisions of the federal courts interpreting FOIA, the fee waiver provision in ORS 192.440 should be interpreted particularly to facilitate access to public records by citizen "watchdog" and nonprofit public interest organizations that challenge agency actions and policies. Plaintiff argues that the evidence at trial demonstrated that OHSU failed even to consider the applicable waiver criteria and that, instead, it denied plaintiff's waiver request based only on the inconvenience and financial detriment to it of furnishing the records.

In Defense of Animals, 160 Or App at 187.

The list of factors in the MANUAL does not purport to be an exhaustive list. Instead, the MANUAL describes what the relevant factors "include." MANUAL at 21. As the MANUAL acknowledges, it is necessary to consider "the totality of the circumstances presented." MANUAL at 20, *quoting* ***In Defense of Animals***. The tension between the policy of transparent governance and the financial burden of providing free access to records underlies the fee waiver provisions of the Public Records Law. We agree with your contention that public bodies must give some consideration to the public's interest in disclosure of the records when evaluating waiver requests. But it would be inconsistent with the statutory grant of discretion to require that public bodies always resolve the underlying tension in favor of the public's interest in disclosure. Instead, a public body's decision must be upheld if it is objectively reasonable under all of the circumstances presented.

Notwithstanding the directive to consider all of the relevant circumstances, ***In Defense of Animals*** does not explain how various circumstances should be weighed as part of an overall assessment of reasonableness. The court does observe that "the Public Records Law as a whole embodies a strong policy in favor of the public's right to inspect public records." 199 Or App at 189-190. And the court notes that "the public body's discretion must be exercised within the range of lawful options available to it under the relevant law." *Id.* at 189. Consequently, the appropriate inquiry appears to be whether the public body's decision impedes the policies favoring disclosure of public records to the extent that the decision cannot be said to reflect a "lawful option[]" under the Public Records Law. In general, we think that a public body's fee-waiver decision should consider (1) the character of the public interest in the particular disclosure; (2) the extent to which the fee impedes that public interest; and (3) the extent to which a waiver would burden the agency.[1] We review the totality of the circumstances to determine whether the agency's decision exceeds the lawful options available to it under the Public Records Law.

In this case, we believe that Risk Management has explained the significant burden on the agency that would result from further waiver of its fee. As previously noted, your request spans a seven year period and asks for multiple documents for each claim filed against the Oregon Department of Corrections in an amount of $1000 or greater. Ms. Peters' May 15, 2009 letter described the ways in which responding to your broad request would interfere with the normal business of Risk Management managerial and support staff, and require Risk Management to incur legal costs for review of records by its counsel within the Department of

[1] Of course, we do not foreclose the possibility that other considerations may be appropriate in any given case.

Justice. Because our office bills client agencies for services, those costs are fixed costs to Risk Management. Ms. Peters' letter also explained the grim budgetary situation facing the State of Oregon. *See* MANUAL at 21.

We further conclude that, although we have identified a public interest in disclosure sufficient to permit a fee waiver, the public interest in the particular disclosure you have requested is not, on the whole, particularly great.

As we have already observed, your request spans seven years of Risk Management files. And it is phrased broadly, reaching "records containing details about ***any claims***, settlements, ***or*** verdicts" (emphasis added) related to Oregon corrections. Where payment was made or ordered, the request also reaches "any * * * document that discloses the facts underlying the incident leading to the settlement or verdict" among other things. Some documents responsive to this request are likely to be duplicative of others, and the request as written is likely to reach privileged legal advice and other exempt materials that must be segregated and therefore will not be disclosed. The public's interest in disclosure of records responsive to your request is diminished by those features of your request.

We also note that $1,000.00 is a relatively low threshold for a request seeking documents related to claims against the state and its employees. Regardless of whether responsive documents might illuminate instances of wrongdoing by corrections personnel (potentially minor, given the $1,000.00 threshold), frivolous complaints by complainants, or nuisance-value settlements by Risk Management, the low threshold makes it likely that your request will reach a number of records that will be of limited, if any, interest to the public.

On the whole, it appears to us that a narrower request of Risk Management could substantially reduce the burden on that public agency without significantly diminishing the extent to which disclosure would serve the public's interest. Such a request would also permit you to follow up should you conclude that you require further information about any particular claim or claims. We do not mean to suggest that we would necessarily order Risk Management to waive its fees in response to a narrower request for records. But when the breadth of a request contributes significantly to a large fee estimate while only marginally increasing the public utility of the request, it is hard to say that the public body acts unreasonably when it denies a request to waive the fairly sizable fee.

3. Sufficiency of Risk Management's Fee Reduction

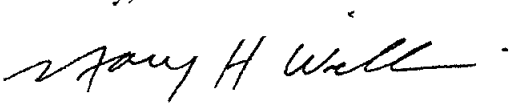
Finally, we reach your contention that, because Risk Management agreed to reduce its fee, it was required to reduce the fee more than it did. You base this argument on the fact that ORS 192.440(5) authorizes a public body to "furnish copies without charge or at a substantially reduced fee." We have agreed with Risk Management's view that it was permitted to offer you a fee reduction under ORS 192.440(5) because "because making the record[s] available primarily benefits the general public." We have also concluded that Risk Management acted reasonably in denying the requested fee waiver.

We do not address your contention that the reduction offered by Risk Management was not substantial. We need not address that questionable assertion because we do not agree that ORS 192.440(5) requires that a public body either grant a complete waiver, grant a "substantial" reduction, or charge the entire amount of its fee. Even where the public interest test is met, a public body has discretion to charge the entirety of its fee, provided that it exercises that discretion reasonably. As a result, it would be curious to conclude that a public body lacks authority to grant a partial waiver in an amount that the requester asserts is insubstantial. We do not see how such an interpretation of ORS 192.440(5) would serve the public's interest in the disclosure of records. For the same reasons that we concluded that Risk Management acted reasonably in denying your waiver request, we conclude that Risk Management acted reasonably in offering you the waiver that it offered.

Conclusion

For the reasons described above, we respectfully deny your petition.

Sincerely,



MARY H. WILLIAMS
Deputy Attorney General

c: Andrea Peters, Risk Analyst, DAS/Risk Management Unit