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September 10, 2009

Will Rogers, Executive Editor
The Liberty
103 Memorial Union, #415
Oregon State University
Corvallis, OR 97331

Re: Petition for Public Record Disclosure Order:
*Oregon State University Documents*

Dear Mr. Rogers:

On August 26, 2009, we received your petition asking the Attorney General to order Oregon State University (OSU) to disclose certain public records to him under Oregon's Public Records Law, ORS 192.410 to 192.505. You also ask the Attorney General to determine that OSU did not respond reasonably to your fee waiver request. ORS 192.440(6). You agreed to extend our statutory deadline for responding to your petition until September 10, 2009, and we thank you for that courtesy. For the reasons that follow, we are compelled to respectfully deny your petition.

The records you request are related to OSU's removal of several distribution bins for The Liberty. The Liberty is a newspaper that is published with some degree of OSU student involvement. You are a student and the managing editor of The Liberty. The distribution bins in question were removed by OSU several months ago. On behalf of The Liberty, you have publicly challenged the propriety of OSU's actions. The specific records in question are "copies of [OSU]'s correspondences on the subject of The Liberty student paper, newspaper bins on campus, and the OSU Students Alliance." The request covers the period from October 2008 to the date of the request, which was June 14, 2009. We understand The Liberty has also threatened related litigation against OSU. "Alternative campus paper claims censorship," Corvallis Gazette-Times, June 8, 2002 (http://gazettetimes.com/news/local/article_97dc149e-0c69-53ef-b348-0ec807d9f0c5.html (last accessed September 9, 2009)).

We note at the outset that OSU has not denied your request for records, but has instead conditioned disclosure on payment of its fees. In a letter to you dated August 13, 2009, Charles Fletcher, Associate General Counsel at OSU, indicated that OSU "will provide the requested records upon receipt of payment in the amount of $466.50." Because OSU is willing to provide the records, we must respectfully deny your petition to the extent that you seek an order compelling disclosure of the records.

We turn to your assertion that OSU's response to his fee waiver request was unreasonable. You acknowledge that OSU initially informed you that the required fee would be $622.01. OSU subsequently agreed to waive 25 percent of its fee, bringing the total to $466.50. You assert that OSU should be required to entirely waive its public records fees.

The Public Records Law authorizes public bodies to "establish fees reasonably calculated to reimburse the public body for the public body's actual cost of making public records available." ORS 192.440(4)(a). At various points in his petition, you appear to assert that OSU's fee is not reasonably calculated. In general, the Attorney General has determined that the Public Records Law does not authorize the Attorney General to review fee amounts established by public bodies to determine whether the fee is reasonable. *See* ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) (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, and we do not further consider your arguments suggesting that the fee itself is unreasonably calculated.

The Public Records Law also authorizes public bodies to waive or reduce their fees under certain circumstances:

> 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). The Public Records Law specifically authorizes public records requesters to petition the Attorney General if they are dissatisfied with a public body's response to a request for waiver. ORS 192.440(6).

In reviewing fee waiver decisions, 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" as required by ORS 192.440(5). You observe that OSU's decision to waive a portion of its fee implicitly acknowledges that a waiver would serve the public interest, and we agree.

By itself, however, that conclusion does not mean that OSU was required to do any more than it did. 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 OSU's decision with respect to the waiver request was reasonable, we must "examine the totality of the circumstances presented." *Id.* at 189-190. A public body's decision must be upheld if it is objectively "reasonable" under all of the circumstances presented.[1]

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.[2] 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.

We begin by determining that there is a substantial public interest in this particular disclosure. As we have already mentioned, the documents in question relate to OSU's decision to remove a number of The Liberty's newspaper distribution bins from various locations on campus. Without opining on the propriety of OSU's actions, we observe that regulation of newspaper distribution racks on public property can raise substantial free speech issues. *See, for example*, ***Lakewood v. Plain Dealer Publishing Co.***, 486 US 750 (1988). We have no trouble concluding that First Amendment rights are a subject of substantial public interest. We also are aware of media interest in the underlying events. *See*

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[1] We note that the Attorney General has often upheld the reasonableness of a 25% fee waiver. MANUAL at 21. A 25% waiver is not conclusively reasonable in all circumstances, however.

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

http://www.oregonlive.com/news/index.ssf/2009/06/journal_protests_against_orego.html; http://kezi.com/news/local/121868 (both accessed on September 9, 2009).

We also expressly acknowledge OSU's position that its actions were proper and had nothing to do with regulation of expression. OSU explains that its decision was a straightforward exercise of its general authority to maintain its facilities free from clutter and obstructions, partly in furtherance of other legal obligations such as those imposed by the Americans with Disabilities Act.

As noted, we do not need to resolve—and so have not closely analyzed either factually or legally—the merits of the underlying free speech issue. Superficially, however, a non-trivial constitutional question may be presented. Accordingly, we perceive a substantial public interest.

We next ask whether the remaining fee amount of $466.50 (following OSU's 25 percent waiver) is a significant impediment to disclosure. We are aware that you are a university student and that The Liberty is a small, non-profit paper. In your petition, you indicate that you effectively "do not have access" to the records because of the $466.50 fee. We note, however, that The Liberty has threatened litigation over this issue. It seems to us that there is significant tension between the threat of litigation, on the one hand, and the professed inability to pay the $466.50 fee, on the other hand. OSU's fee is very small in comparison to the costs that would likely be incurred by, or on behalf of, The Liberty in conjunction with litigation. Given that tension, we are unable to ascribe significant weight to the assertion that a $466.50 fee significantly impedes disclosure.

Finally, as a general proposition, a waiver imposes on the public body whatever expense would otherwise be the requester's obligation. In evaluating the burden imposed on OSU, we have considered various relevant factors listed in the MANUAL. Pertinent factors include the volume of the records requested and the necessity to segregate exempt from non-exempt records. MANUAL at 21. We understand that OSU identified 589 pages of records responsive to your request. The fact that your request came after a threat of litigation likely increased the burden – and the importance – of segregating exempt from non-exempt records.

Again, we do not weigh those considerations anew ourselves. Our duty and authority is limited to reviewing whether OSU abused its discretion by unreasonably denying your waiver request. Importantly, discretionary standards entail a "range of lawful options." ***In Defense of Animals***, 199 Or App at 189. Whether we might have weighed the circumstances differently in the first instance is of no moment, provided the agency has exercised its discretion reasonably.

Considering the totality of the circumstances, we cannot conclude that OSU's response to your waiver request was unreasonable. Despite the public interest in the issue underlying your request, we perceive also a degree of private interest in that the records request appears to relate

to the threatened litigation. On balance, the degree to which OSU's reduced fee impedes the public interest in disclosure is not unreasonable in comparison to the cost to OSU of responding to your request. As a result, we must respectfully deny your petition.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

c: Charles Fletcher, OSU