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April 24, 2009

SENT VIA REGULAR MAIL & E-MAIL

William T. Harbaugh
538 PLC
1285 University of Oregon
Eugene, OR 97403-1285
(wtharbaugh@gmail.com)

Re: Petition for Public Records Disclosure Order:
University of Oregon Banner Records for UMRP

Dear Professor Harbaugh:

On April 17, 2009,[1] we received your "[p]etition number ?"[2] for a Public Records Order pertaining to certain BANNER system accounting records in the custody of the University of Oregon (UO). You seek the records as evidentiary support for certain allegations you have made to the Attorney General and to the Oregon State Bar concerning UO General Counsel Melinda Grier. For the reasons that follow, your petition is respectfully denied.

The records you have requested are "transactions detail reports for all indices dedicated to UO's UMRP programs from 1995 to the present." On June 9, 2008, UO estimated its cost of responding to that request at $390, and stated that it would require you to prepay $293 in view of UO's agreement to waive 25 percent of the applicable fee. UO also indicated that the cost of providing the documents might exceed its estimated cost, in which case you would be required to pay 75 percent of the actual cost of making the documents available. UO received your prepayment of $293 on February 3, 2009.

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[1] Your petition was delivered by email after the close of business on April 16, 2009; we therefore treat it as received on April 17, 2009.

[2] We believe the answer to your question mark is 5. *See* Public Records Order, March 2, 2009, Harbaugh; Public Records Order, February 20, 2009, Harbaugh; Public Records Order, February 12, 2009, Harbaugh, and Public Records Order, May 20, 2008, Harbaugh.

On March 2, 2009, UO provided you with, by our count, 310 pages of documents in response to this request. On April 4, you emailed UO to report that the documents provided by UO appeared to be incomplete, and also were not in "machine readable" format as you had requested. You asked UO to provide you with a complete set of documents, and stated that you were not objecting to the format of the documents.

UO responded on April 10, indicating that its review had confirmed that the documents provided to you were incomplete, explaining that the department that gathered the responsive materials had taken a narrow view of the scope of your request. UO indicated that it was willing to make the nonexempt materials available to you, and would generate a fee estimate for doing so if you indicated that UO should proceed.

You responded in turn on the same day, pointing out that UO's June 9, 2008 fee estimate was generated in response to a request that clearly encompassed the documents in question. UO did not dispute that point, but replied on April 16, 2009 that the actual cost of providing the documents disclosed to you on March 2, 2009 had exceeded the June 9, 2008 estimate, and additional fees would be required in order to continue responding to your request.

As noted above, your petition to the Attorney General was received on April 17, 2009. You stated in a footnote to that petition that you would follow the petition immediately with a request that UO waive any additional fees. In general, such requests should be made and denied before petitioning the Attorney General. ORS 192.440(6) (permitting petitions by any person who believes that a waiver request has been unreasonably denied). However, you did request a complete fee waiver on April 23, 2008, and that request was denied on June 9, 2008 when UO offered to waive 25 percent of its fees. In addition, UO has stated its intention to deny your pending request for a fee waiver. Under the circumstances, we believe that we can properly proceed to the merits of your petition.

Oregon's Public Records Law, ORS 192.410 to 192.505, confers upon "any person" the "right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.420(1). Public bodies are authorized to charge and collect a fee "reasonably calculated to reimburse the public body for the public body's actual cost of making public records available." ORS 192.440(4)(a).

The Attorney General has long expressed the view that agencies may require prepayment of estimated fees before proceeding to make their records available for inspection. *See, for example*, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) (MANUAL) at 15. But what happens when the agency's actual cost of providing records exceeds the pre-paid estimate?

In light of the fact that the Public Records Law authorizes fees "reasonably calculated to reimburse the [agency] for the cost of making [its] records available," we think that an agency has the authority to bill public records requesters for the difference between the estimated and actual cost, subject to any fee waiver or reduction granted by the public agency. At least where

the disclosure in question serves the public interest, we believe that an agency also has the discretionary authority to waive that difference, ORS 192.440(5).

The foregoing observations do not resolve your petition, however. For one thing, you have asked for a complete waiver of the remaining fee, and we must assess the reasonableness of UO's response to that request. For another thing, UO has not billed you for the difference between actual and estimated cost, but has instead stated that it will first provide you with a new estimate in order to proceed with making the records available for your inspection. The principles just discussed do not resolve the propriety of that procedural approach.

With respect to your request for a complete fee waiver, a threshold question is whether the disclosure to you "primarily benefits the general public." ORS 192.440(5). In light of the general public interest in knowing about expenditures of UO funds, the particular public interest in the appropriate resolution of your allegations concerning Ms. Grier, your ability to disseminate the information to the public, and the lack of any apparent private benefit to you, we believe that the disclosure to you "primarily benefits the public."

Having answered that question, it remains to determine whether UO's decision with respect to your waiver request is reasonable. Again, the initial decision was to offer you a 25 percent discount; UO subsequently decided to waive additional costs it incurred in providing you with records on March 2, 2009, and UO has now determined that it will require you to pay all of the remaining costs for the records.

In considering the reasonableness of UO's approach, the Attorney General considers all of the relevant circumstances. MANUAL at 20-21. One relevant – and novel – circumstance in this case is UO's expectation that, even after paying the full amount of the remaining costs, your overall discount will meet or exceed the 25 percent discount that UO originally offered you. In other words, although UO intends to require that you pay the full *remaining* fee amounts, your overall effective fee reduction is anticipated to be at least 25 percent. "We have concluded, under the facts of several cases, that fee reductions of approximately 25 percent were not unreasonable." MANUAL at 21.

Another relevant factor is the overall burden that your numerous public records requests create for UO; we have indicated on a number of occasions that UO may legitimately consider that factor when evaluating your requests that UO waive or reduce public records fees. *See* Public Records Order, February 26, 2009, Harbaugh; Public Records Order, March 18, 2008, Harbaugh (citing previous orders to the same effect).

The relevant factors that might favor requiring UO to waive some portion of the remaining costs weigh lightly in our analysis. In this regard, we note that UO has already provided you with more than 300 pages of records that are of the same type, while waiving a significant amount of the associated cost. *See* Public Records Order, March 27, 2002, Zaitz (if insisting on payment of fees does not prevent disclosure of records, that fact is relevant to evaluating the reasonableness of a waiver denial). You state that the documents are pertinent evidence relating to your complaints about Melinda Grier, but we have no basis to expect that

they will be different in character than the 300-plus pages that UO has already provided to you. To the extent that the sheer volume of the records may be relevant to your complaints, UO has acknowledged that the pages provided so far are an incomplete data set. Thus, although we acknowledge a public interest in the disclosure to you, we do not see that the public interest is so pressing to make UO's decision to effectively waive approximately one-quarter of the overall fees unreasonable.

In light of all of the relevant circumstances, we think that UO's substantive decisions with respect to your waiver requests have been reasonable.

We turn to the fact that UO is proposing to estimate the costs for fulfilling the remainder of your April 23, 2008 records request. We decline to explore the general propriety of that approach to all situations where the actual costs exceed the estimate. Under the circumstances of this case, we think UO may properly confirm your understanding that additional fees will be required, and confirm your agreement to pay such additional fees in an amount that is realistically estimated.

One highly relevant circumstance is the degree to which UO originally underestimated the fee amount. When it determined to waive all costs already incurred in excess of $293, UO was aware that its initial estimate was far too low. However, UO believed that its response to your request was complete, and UO was able to waive the full amount of the excess rather than billing you for the significant difference.

Of course, UO's belief that it had fully responded to your request was incorrect, as your correspondence subsequently revealed. Your petition effectively asserts that, because UO determined to waive all of the additional costs it incurred in making documents available to you on March 2, 2009, UO must now continue to waive all additional costs of responding to your underlying request.

You argument in support of your position is that you have already "purchased" the records in question and therefore UO should not charge you more money for providing the documents. In your April 10 email to UO, for example, you state that you "did not receive what [you were] paying for" and that you "expect at least to get the content that [you] paid [UO] for." Similarly, you refer in your petition to "data [you] had paid [UO] for."

But the transaction contemplated by the Public Records Law is not necessarily the sale of a discrete set of public records at a cost agreed upon beforehand.[3] Instead, the authorized fee charged by a public agency should reasonably reimburse the actual costs of making the records available. ORS 192.4405(4). UO's fees are tied to the actual cost of making any particular records available. University of Oregon Public Records Procedure, available at http://pmr.uoregon.edu/university-of-oregon-public-records-procedure (accessed April 21, 2009). To the extent that purchasing is a useful analogy, a public records requester seeking UO records is purchasing the UO resources that go into making the documents available – primarily staff

[3] The Public Records Law is, however, flexible enough to permit transactions more of this nature; an agency may establish a fixed per-page charge for making records available. See MANUAL at 16.

time and a copy fee. *Id.* We have long viewed such an approach as consistent with the fee provisions in the Public Records Law. *See, for example*, MANUAL at 16. The pertinent statutory provisions embody a legislative determination that a requester should typically compensate the public when a public body's resources are diverted to responding to public records requests.

Seen in that light, you have not "purchased" any particular records. Instead, you have purchased an amount of UO resources that has proved insufficient to create the entire set of records that you are seeking. And, to continue with the analogy to purchases, you have made it clear that you are not presently willing to purchase any additional UO resources for the purpose of completing the task. Yet you are insisting that UO provide you with the documents that UO cannot produce without expending additional resources. In light of our determination that UO's fee waiver decisions have been reasonable, the Public Records Law offers no basis for concluding that UO must provide you with the remaining documents free of charge.

In sum, we find that UO reasonably responded to your requests for waiver of these fees; ultimately UO expects that it will have waived at least 25 percent of the total cost of providing you with the records you requested. We also find that UO's decision to estimate the fees required to respond to the remainder of your request is procedurally permissible considering the difference between the initial estimate and the actual cost, and the fact that you have indicated unwillingness to pay applicable fees. Unless you are willing to pay the fees associated with your request, the Public Records Law does not require UO to expend the resources required to make additional responsive records available to you. Your petition is respectfully denied.

Sincerely,

for MARY H. WILLIAMS
Deputy Attorney General

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