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April 10, 2009

Wendie L. Kellington
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Re: Petition for Public Records Disclosure:
Department of Environmental Quality Records

Dear Ms. Kellington:

On March 27, we received your petition dated March 26, asking the Attorney General to order the Department of Environmental Quality (DEQ) to disclose certain records to you under the Oregon Public Records Law, ORS 192.410 to 192.505.[1] The records in question consist of:

1. Financial Assurance Plans for Municipal Construction and/or Demolition Landfills

   * * *

2. Yearly Financial Assurance Updates for the years 2004-2008 for the [facilities described in item 1]

   * * *

3. Financial Assurance Plans for Municipal Solid Waste Landfills as defined by [rule]

   * * *

4. Yearly Updates of the Financial Assurance Plans for the years 2004-2008 for the [facilities described in item 3]

[1] Thank you for allowing us additional time to respond to your petition.

5. * * * all Public Records Regarding "Financial Assurance Requirements."

Petition at 2-3 (boldface and underlining omitted). A number of these issues were dealt with in a Public Records Order addressed to you and to Audrey O'Brien on behalf of DEQ on March 23, 2009. For the reasons that follow, we respectfully deny your present 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). The Public Records Law reflects a "strong and enduring policy that public records and governmental activities be open to the public," ***Jordan v. MVD***, 308 Ore. 433, 438, 781 P.2d 1203 (1989). Consequently, exemptions from disclosure not only must be "express," ORS 192.420(1), but express exemptions "are to be narrowly construed." ***City of Portland v. Oregonian Publishing Co.***, 200 Or App 120, 124, 112 P3d 457 (2005).

In responding to public records requests, public bodies are required to provide "proper and reasonable opportunities for inspection." ORS 192.430. This provision "correspondingly allows the public body a 'reasonable' time to actually provide copies of the requested records[,] * * * make them available for inspection," or withhold records on the basis of an exemption from disclosure under the Public Records Law. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) (MANUAL) at 10. 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). "A public body may require prepayment of its estimated charges before taking further action on a request." MANUAL at 15.

The general background of this public records petition is described in our March 23, 2009 Public Records Order and need not be repeated. For purposes of the current petition, the primary point of dispute between you and DEQ goes to the scope of your May 13, 2008 request for records. That request was sent via email to Assistant Attorney General Larry Edelman, who is general counsel to the Department of Environmental Quality. In full, the body of your May 13 email reads as follows:

> Larry, as we briefly discussed, please consider this email is [sic] a further public records request for Grahorn Inc, [*sic*] and Lakeside Reclamation Landfill (LRL) for the right to review the following public records:
>
> All public records as that term is defined in state law, including email correspondence, regarding financial assurance requirements or financial assurance programs or specific financial assurance plans, supplements, amendments, or requirements, including correspondence regarding any of these, for, by or between all Oregon Municipal Solid Waste Landfills from 2004 to the present. This request includes access to all correspondence by and between DEQ staff and the operators, managers, owners or lawyers for Oregon Municipal Solid Waste Landfills that includes negotiation, objection, enforcement, demands, requests or requirements for financial assurance or any element of financial assurance for

> such landfills. I am advised that my client has particular interest in the electronic and other records within the scope of this request for, by, from, to, between or copied to Lissa Druback, Loretta Pickerell, Brian Fuller, David Belyea, Audrey O'Brien, Tim Spencer, Nina Diconcini and Jim Harris, Judy Coffman, Julie Bernett, Gene Wong, David Esch, Hugh Gao, Bob Barrows, Craig Filip, Cathie Davidson, Susan Christensen, Shari Harris-Dunning, Joe Gingerich, Ken Lucas, Bruce Lumper, and John Straughn. Thank you.

Your request was forwarded to Ms. O'Brien at DEQ. Ms. O'Brien states that she, on behalf of DEQ, understood your request to be limited to documents that pertain to a specific municipal solid waste landfill, and limited to documents generated between 2004 and 2008. In our Order of March 23, 2009, we agreed that DEQ had understood your request to be so limited, and expressed the view that DEQ's interpretation was reasonable. We adhere to those decisions.

It is true that DEQ's estimate refers to "municipal solid waste and municipal demolition waste" landfills, while the only landfills specifically mentioned in your May 13, 2008 emails are "Municipal Solid Waste Landfills." Ms. O'Brien explains that she included municipal demolition waste landfills in her response to you because your client operates a demolition landfill, not a solid waste landfill, and she thought that your client would benefit from that change. To limit the effect of broadening your request in that way, Ms. O'Brien indicates that she selected a subset of those types of landfills statewide. The attachment to Ms. O'Brien's June 24, 2008 letter states that the number of landfills would be "approximately 49." Ms. O'Brien's letter also provided you with a list of landfills throughout Oregon that have financial assurance requirements, "for your use if you would like to modify your information request," presumably by providing DEQ with your own list of landfills for which DEQ should provide documents. You did not take up that invitation. Ms. O'Brien believes that the actual number of landfills for which DEQ actually provided you with records is 55.[2]

Ms. O'Brien viewed her interpretation as broadening your request in light of your likely needs. It is now clear that you view Ms. O'Brien's interpretation as an unwarranted narrowing of your request. But you did not indicate any objection to Ms. O'Brien's explanation of what she proposed to provide in response to your request until December of 2008. In a December 29, 2008 letter to Ms. O'Brien, you disputed DEQ's interpretation of your May 13, 2008 request. You also declined to agree to pay additional fees for the records.

With respect to the reasonableness of DEQ's understanding, we repeat our observation that the substance of your May 13, 2008 request for records is made in a single sentence containing five clauses and eight commas. Public Records Order, March 23, 2009, Kellington at

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[2] Specifically, Ms. O'Brien indicates that DEQ provided financial assurance documents for:

> 22 landfills in Western Region – email copies provided on CD
> 20 landfills in Eastern Region – email copies provided on CD
> 13 landfills in Northwest Region – hard copy files made available for review in July or August 2008

Ms. O'Brien confirmed that the documents provided included the financial assurance records related to the six specific landfills that you identify on the second page of your petition.

9, note 10. Ms. O'Brien believed that the last clause, "for, by or between all Oregon Municipal Solid Waste Landfills from 2004 to the present" modified the entire request. In light of the comma preceding that clause, the length and complexity of the sentence, and the context provided by the following discussion of particular records that you are interested in, her understanding was reasonable.

Under the circumstances, we also find reasonable (a) her belief that she should expand the request to include landfills of the type operated by your client, and (b) the accompanying decision to provide documents for only a subset of the 92 landfills potentially implicated by that expansive reading. In this regard, we emphasize that Ms. O'Brien's June 24, 2008 letter clearly indicated that:

- she was including municipal demolition waste landfills in generating the fee estimate;
- there were approximately 92 municipal solid waste landfills and demolition landfills in the state;
- DEQ proposed to provide you with records pertaining to approximately 49 landfills; and
- you were invited to submit a modified request based on a provided list of landfills to which financial assurance requirements apply.

Thus, to the extent that Ms. O'Brien understood that she was changing the scope of your request, those changes were apparent from her response, and she invited you to weigh in.

Your present petition takes issue with our determination that DEQ reasonably understood your May, 2008 requests to be limited. You argue that DEQ did not have that understanding by pointing out a number of ambiguities and grammatical features of Ms. O'Brien's June 24, 2008 letter enclosing the fee estimate. For example, you state

> [O]n June 24, 2008, DEQ said it would cost an estimated $5,100 for DEQ to provide Grabhorn with a variety of records, including "all public records *regarding financial assurance requirements* * * *" (Emphasis supplied.) DEQ *also* indicated it understood Grabhorn's request to include, and quoted a price for Grabhorn to obtain, specific financial assurance requirements for specific landfills (* * * or specific financial assurance plans, supplements, amendments or requirements, including correspondence on all Oregon municipal solid waste landfills * * *.")

Petition at 3. We observe that your ellipses remove language from Ms. O'Brien's statements that could suggest that her understanding in June of 2008 was exactly as she has consistently described it. And to the extent that you are implying that DEQ provided separate estimates for specific financial assurance documents and general assurance documents, the implication is simply incorrect. Nevertheless, we acknowledge that portions of Ms. O'Brien's June 24, 2008 letter, read in isolation, are susceptible of the interpretation you offer.

As with your May 13 email, the technical grammatical meaning of certain sentences depends upon whether certain clauses modify certain other clauses, as illustrated by the following sentence from Ms. O'Brien's response:

> You would like all public records regarding financial assurance requirements, financial assurance programs or specific financial assurance plans, supplements, amendments, or requirements, including correspondence on all Oregon municipal solid waste and municipal demolition landfills (about 49 landfills) from January 1, 2004 to 5/6/2008.

Here, the lack of commas following "correspondence" and preceding "from January 1, 2004" indicate that the date limitations and the facility-specific limitations do not modify the entire sentence but instead only modify "correspondence." Read in a vacuum, we would agree with your interpretation of the sentence.

But we cannot read the sentence in a vacuum. Instead we must read the sentence in light of all of the following:

- The May 13, 2008 request to which the letter was responding;
- Other parts of the June 24, 2008 correspondence, particularly the attachment; and
- DEQ's consistent subsequent statements about the scope of its June 24, 2008 estimate.

This context satisfies us that Ms. O'Brien did not intend the literal meaning of the sentence quoted above.

With respect to the first bullet point, giving Ms. O'Brien's sentence its literal meaning would make DEQ's response to your request far broader than the language of the request itself would suggest.[3] With respect to the second bullet point, the attachment to Ms. O'Brien's June 24, 2008 letter states:

> This request requires that staff * * * review all of their emails, written correspondence, and documents, notes, etc. ***for approximately 49 landfills throughout Oregon***, both municipal solid waste and municipal demolition waste. This request ***does not include financial assurance public records for industrial wood waste landfills or other types of industrial landfills.***

[3] Of course, you understood your May 13 email to ask for the records that you subjectively intended to request. Unfortunately, the quoted language from Ms. O'Brien's response would tend to confirm to a reader in your position that DEQ shared that understanding. The likelihood that Ms. O'Brien's letter contributed to the misunderstanding between you and DEQ, as we discuss below, does not mean that Ms. O'Brien actually had the understanding you attribute to DEQ.

(Emphasis added.) The emphasized portions of this response are inconsistent with your insistence that DEQ actually knew you were seeking documents with no relationship to any particular landfill, or documents related to any types of landfills regulated by DEQ. With respect to the third bullet point, DEQ's position has not changed since you first directly requested the relevant records on December 9, 2008. In a December 15, 2008 email to you, Regina Cutler of DEQ indicated that DEQ believed such records were "not within the scope of your prior public records requests." Ms. O'Brien continues to take that position.

In light of all of the above, we think that the exchange between you and Ms. O'Brien evinces a fundamental miscommunication regarding the scope of your May 13, 2008 request. While that apparent misunderstanding originated with unclear language in your request, it was perpetuated by unclear language in Ms. O'Brien's response; both of you appear to have played an unwitting role in the miscommunication. Such things sometimes happen when human beings use language to communicate complex ideas. But the fact that such a misunderstanding occurred does not change our previous decision. DEQ reasonably understood your request to be limited in a number of ways, including a date limitation, a limitation with respect to the landfill type, and a limitation to documents directly pertaining to particular landfills.

The misunderstanding between you and DEQ came to light in December of 2008. On December 29, 2008, you declined to agree to pay DEQ's fees for making the relevant records available to you, despite the fact that DEQ had clearly informed you that it did not understand your May 13, 2008 request to reach those records, and DEQ had not included the cost of providing those records when it generated the estimate you had previously paid. A public agency may require prepayment of its public records fees before proceeding to make its records available for inspection. MANUAL at 15. Consequently, your petition must be respectfully denied insofar as it seeks an order compelling DEQ to disclose records that were not included in the fee estimate DEQ provided to you on June 24, 2008. Those records are:

- Documents generated prior to 2004; according to DEQ, this category likely includes many of the financial assurance plans requested under the first and third numbered items described in your petition.
- Documents related to landfills apart from the "approximately forty-nine" landfills that formed the basis for DEQ's June 24, 2008 estimate; DEQ indicates that this category may include documents requested under the first, third and fourth numbered items described in your petition.
- Documents that do not relate to any particular landfill but instead provide general guidance with respect to financial assurance requirements; this category covers the record or records requested under the fifth numbered item described in your petition.

We do not mean to suggest that you do not have a right to inspect those documents under the Public Records Law. In fact, we express no view as to whether any information appearing in any

of the records is exempt from disclosure.[4] But DEQ is authorized to collect fees reasonably calculated to reimburse it for the actual cost of permitting you to inspect the record. ORS 192.440(4)(a).

Some documents covered by your petition also fall within the scope of DEQ's June 24, 2008 estimate. Those are financial assurance documents generated between January, 2004 and May, 2008, and specific to the "approximately 49" landfills included in DEQ's estimate. Ms. O'Brien reports that DEQ has already provided you with all such documents, including the financial assurance documents for that time period that relate to the six specific landfills identified on the second page of your petition. With respect to such documents, your petition is respectfully denied because DEQ has not denied your right to inspect the records. ORS 192.450(1).

For the reasons described above, your petition is respectfully denied.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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[4] Nor do we purport to decide whether you are entitled to obtain the relevant documents in connection with the pending enforcement proceeding, with or without paying DEQ's public records fees. That is an issue that must ultimately be resolved within the enforcement proceedings; the Public Records Law does not authorize the Attorney General to act as the arbiter of such disputes.