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March 23, 2009

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Re: Petition for Public Records Disclosure:
Department of Environmental Quality Records

Dear Ms. Kellington and Ms. O'Brien:

This letter is the Attorney General's order on Ms. Kellington's February 20, 2009 petition for disclosure of records under the Oregon Public Records Law.[1] Her petition contends that the Oregon Department of Environmental Quality (DEQ) has improperly denied her access to numerous public records. In her petition, and in the underlying requests for public records, we understand that Ms. Kellington acts on behalf of her client, Grabhorn, Inc. (Grabhorn), a landfill operator that is currently the subject of an enforcement proceeding before DEQ.

Ms. Kellington's petition, which is thirty-three pages long, describes three "particular categories" of ways in which she believes DEQ has failed to comply with Oregon's Public Records Law, ORS 192.410 to ORS 192.505:

1. Complete denial of requested public records including through charging improper and unreasonable fees
2. Denial of complete public records
3. Denial of requested public documents on improper claims of privilege

[1] We thank Ms. Kellington for allowing us until March 23, 2009 to respond to her petition.

Petition at 5. Fully fleshed out, we understand the petition to raise six arguments under the Public Records Law. First, Ms. Kellington asserts that the fees DEQ has required her to pay constitute "an improper denial of Grabhorn's right to access public records." Petition at 6-8. Second, she objects to DEQ's February, 12, 2009 announcement that she must submit a particular form and pay $1090 in fees before DEQ would respond to a request for records originally made in October of 2008. Petition at 6. Third, the petition asserts that a reasonable time for responding to certain records requests has elapsed, and therefore DEQ has constructively denied the request. Petition at 7. Fourth, she believes that the records provided by DEQ show several omitted attachments to documents, which she asserts DEQ should have provided. Petition at 8-23. Fifth, she objects to records redacted by DEQ without an explanation for the redactions, and asserts that redaction is inappropriate. Petition at 23-27. Finally, Ms. Kellington objects to DEQ's decision to withhold certain documents on the basis that they are exempt from disclosure, as she does not believe that DEQ has sustained its burden of showing any exemption. Petition at 27-32.

For the reasons that follow, Ms. Kellington's petition is granted in part and respectfully denied in part. After summarizing the factual and legal background, we address her six arguments in the order just discussed.

BACKGROUND

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.

Ms. Kellington originally requested records from DEQ on May 6, 2008. She made subsequent requests on May 13, 2008, October 14, 2008, and December 9, 2008. Petition at 1. Ms. Kellington and another representative of Grabhorn have reviewed responsive DEQ

documents a number of times, on July 23 and 24, 2008, and "several times in August, 2008." Petition at 3-4. The petition states that "DEQ provided a total of 10,010 hardcopies of documents and 5 CDs of documents [containing] another 10,914 copies of documents." Petition at 7. Although it is somewhat unclear, the petition seems to indicate that, of the documents on the CDs, "about 1/3 of them are duplicates." Thus it appears that DEQ has allowed inspection of responsive records on several occasions, and has provided over ten thousand copies of unique documents, probably somewhere between seventeen thousand and twenty-one thousand total copies (physical and electronic).

All of Ms. Kellington's requests relate to the enforcement action initiated by DEQ against Grabhorn on December 12, 2007. She is effectively using the Public Records Law as a discovery tool. DEQ's rules appear to require such a process. OAR 340-011-0550(1)(a) ("If the participant is seeking information from a public agency, the participant must make a public record request prior to petitioning for discovery.")[2] We note, however, that this rule does not appear to preclude a party from seeking discovery after making a public records request if the requester is unable to timely obtain necessary documents through the public records law.

As we have recently had occasion to observe, the considerations relevant to discovery are not the same as the considerations relevant to public records requests. Public Records Order, February 24, 2009, Ringo. By funneling discovery through the public records law, DEQ removes the limiting factor of relevance from the discovery process, because it is unnecessary to show relevance when making a request for public records. This encourages broad requests for documents, such as Ms. Kellington's request for documents "mentioning, relating to or in any way reflecting on" her client, its principal, and its business. In this way, parties can obtain numerous records that no pragmatic Administrative Law Judge (ALJ) would likely admit into evidence. Of course, taking that approach may invite delays that could affect a party's ability to prepare for the hearing and meet various deadlines. At the same time, DEQ's rule potentially increases the number of grounds for initially withholding documents, by incorporating the extensive lists of exemptions in ORS 192.501 and 192.502.

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[2] Ms. Kellington also cites the Attorney General's Model Rule regarding discovery in contested case proceedings, OAR 137-003-0570(18), apparently to support her statement that a public records request is required to obtain information from a public agency that is relevant to an enforcement case. However, the Attorney General's Model Rule merely recognizes that "a party" (as distinct from "an agency," *compare* OAR 137-003-0570(1)) has the ***right*** to use the Public Records Law "[i]n addition to or in lieu of any other discovery method" to get information from public agencies. OAR 137-003-0570(18) does not mean that a party is ***required*** to utilize public records requests. The Model Rule does require that parties attempt to obtain information informally before seeking discovery, OAR 137-003-0570(1). But that is not the same as requiring that parties first use the Public Records Law, which is a formal legal mechanism for securing public records. The Model Rule also provides that "[an] agency may adopt rules governing discovery in the agency's contested cases as long as those rules are not in conflict with the requirements of this rule." OAR 137-003-0570(8).

I. Denial through Fees

As noted above, Ms. Kellington's first argument alleges that the fees imposed by DEQ, totaling $7,840 ($6,750 already paid by Grabhorn and another $1,090 required by DEQ in response to her October 14, 2008 request) effectively deny her access to DEQ's records. She supports this argument by pointing to instances of apparently duplicative work,[3] redactions that are inconsistent, and her inability to discern any organizing principle with respect to the records provided. Ms. Kellington also seems to assert that the fees were partly based on services that Grabhorn did not actually benefit from, such as copying costs for documents that Grabhorn received on CD rather than in hardcopy. Petition at 7.

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, however, 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.

This is not such a case. The total amount of the fee does not seem disproportionate to the scope of the records request. As noted above, Ms. Kellington and another representative of Grabhorn have inspected DEQ records on a number of occasions and DEQ has provided more than 10,000 copies of records, and likely somewhere between 17,000 and 21,000 total copies. The fact that Ms. Kellington can point to a number of apparent errors or inefficiencies during the process of producing this volume records does not lead us to suspect that DEQ's fees have been imposed in bad faith to impede access to public records. As for her observation that some of the services that formed the basis of the fee estimate were ultimately not done for Grabhorn's benefit, DEQ was clear that its estimated fees of $6750 "[did] not include copying any requested information." DEQ Letter of June 24, 2008. And DEQ's "accounting of the staff time that DEQ staff spent completing the [May 2008 requests]," which was provided to Ms. Kellington on February 12, 2009, shows only 9,717 copies, while Ms. Kellington acknowledges receiving 10,010 hardcopies, Petition at 7. That February 12, 2009 correspondence also informs Ms. Kellington that DEQ is waiving $927.44 in costs that DEQ incurred beyond the $6750 paid by her client.

This record provides no basis for us to suspect that DEQ's fees were imposed in bad faith to prevent Ms. Kellington from accessing its records. As a result, we are without authority to

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[3] Though Ms. Kellington complains about receiving duplicate copies of documents, her petition appears to be seeking multiple copies of several documents. For example, at page 13 of her petition, she complains that two copies of "FAIMD Trust2.doc" are missing along with three copies of "Letter Update Spreadsheet.XLS." She has specifically requested that "attachments * * * be provided with the native original document to which they are attached," thus inviting significant duplication. Letter of December 9, 2008, p. 3 footnote 1. It is possible that in some cases there will be differences between different versions, but Ms. Kellington does not limit her request to those circumstances.

rely on the amount of these fees as the basis for an order compelling disclosure. Nor can we order DEQ to refund the fees her client has already paid.

Having resolved this aspect of Ms. Kellington's petition, we can report that DEQ has advised us that it intends to review its charges to date to determine if there has been any unintentional duplication or overcharge.

II. Denial of October 14, 2008 Request through Belated Form and Fee Requirement

On February 12, 2009, Audrey O'Brien at DEQ sent Ms. Kellington an email enclosing a letter conveying DEQ's "estimate of time needed to respond to [Ms. Kellington's] information request of October 14, 2008." DEQ estimated its fees to be $1090 and requested that she submit a check in that amount and sign a records request form. DEQ stated that it expected to make the records available "by about February 25, 2009," less than two weeks from the date of the payment. This letter came almost exactly four months after the underlying public records request, and six weeks after Ms. Kellington's December 29, 2008 threat to seek review by the Attorney General and the courts of the adequacy of DEQ's response to her requests.

DEQ does not address that timing in its February 12, 2009 letter.[4] Assistant Attorney General Michael C. Kron contacted Ms. O'Brien and discussed this timing. Ms. O'Brien explained that she assumed Ms. Kellington understood that there would be fees associated with the October 14, 2008 request. However, she stated that DEQ did not provide an estimate of the required amount prior to February 12, 2009, and indeed did not provide any written acknowledgment of the October 14, 2008 public records request until the same date.[5] She did not understand that Ms. Kellington had refused to pay additional fees, or that Ms. Kellington would refuse to pay them if informed of the required amount.

ORS 192.440(2) requires public agencies to acknowledge written public records requests, and provide certain information "as soon as practicable and without unreasonable delay" following receipt of a written request for records. We have previously indicated that failure to comply with that requirement is not independently sufficient to show a constructive denial of a request for public records. Public Records Order, October 27, 2008, Harbaugh at 2; *see also* MANUAL at 10. We have also previously concluded that a public agency is generally entitled to have the reasonableness of its response to public records requests judged from the point at which the agency receives prepayment of its estimated fees. Public Records Order, December 11, 2008, Harbaugh at 3. We noted that "[i]f the fee estimate itself is not timely delivered, however, we do not believe a public body should be given the benefit of any resulting delay."

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[4] *Compare* Ms. O'Brien's letter of June 24, 2008, which provides Ms. Kellington with an estimate in response to requests made the month before and "apologize[s] for how late [DEQ's] estimate is."

[5] In fact, Ms. Kellington emailed Ms. O'Brien on November 5, 2008 inquiring about the status of DEQ's response to the October 14, 2008 request. On November 12, 2008 Ms. O'Brien replied by an email discussing DEQ's response to the May 2008 requests and stating "I will hopefully be able to respond to your email and your second request completely tomorrow." That did not happen.

In this case, DEQ took nearly four months to provide Ms. Kellington with a fee estimate. The estimate was untimely.[6] But when DEQ finally did produce the fee estimate, it indicated that the records could be available for inspection "by about February 25, 2009" if Ms. Kellington paid the estimated fees. Had Ms. Kellington prepaid the estimated fees, the dispute over the documents requested in October 2008 would likely be moot.[7]

The Attorney General has authority to decide petitions filed by "any person denied the right to inspect or to receive a copy of any public record of a state agency." As we just described, prior to Ms. Kellington's petition, DEQ explicitly offered her access to responsive records, and stated that such access would follow fairly shortly upon receipt of the fee that ORS 192.440(4) authorizes DEQ to collect. The lengthy delay and the timing with respect to Ms. Killington's threat to seek review of DEQ's actions make it a close question. But given that Ms. Kellington's prepayment of the lawful fee would likely have resulted in a moot petition, we cannot conclude that the belated estimate, and requirement that Ms. Kellington pay the estimated amount, "denied [Ms. Kellington] the right to inspect or to receive a copy" of the records she requested on October 14, 2008.[8]

In light of our resolution of the fee issue, it is not necessary that we resolve Ms. Kellington's arguments concerning the records request form that DEQ has required her to submit. As we understand it, DEQ's position with respect to the form is that it is designed to secure three things: a clear request for each separate records request, prepayment of the estimated fee amounts, and explicit agreement to pay all lawful charges for providing access to its records. Subject to the limits imposed by ORS 192.440(4)(c), which are not implicated here, we think that DEQ is entitled to those things. The form provided by DEQ is a reasonable means of seeking them. However, DEQ assures us that it is willing to accept any equivalent written request that that would accomplish the same ends.

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[6] *See* note 5. If Ms. O'Brien could state on November 12, 2008 that she hoped to respond "completely" to the October 2008 request on the following day, we cannot accept that a response on February 12, 2009 – three months later – was timely.

[7] It is possible, of course, that there might have been oversights as Ms. Kellington alleges with respect to DEQ's response to her May 2008 requests, but there is no reason to think that such oversights should be resolved any differently than we would resolve the earlier ones.

[8] In light of the time that elapsed between the request and DEQ's estimate, we might have reached the opposite conclusion if the circumstances were even slightly different – e.g., if DEQ had not responded at all (*cf* Public Records Order, January 16, 2009, Ringo); if DEQ's offer to allow inspection had followed Ms. Kellington's petition, rather than preceding it; or if DEQ's estimated timeframe for providing access had been longer. In any event, however, an agency would generally be entitled to insist on payment of the applicable fee.

III. Constructive Denial by Lapse of Time

Ms. Kellington's petition lists fourteen categories of records as to which she asserts that "so much time has elapsed, [the requests for these records] have been constructively denied," namely:

a. All DEQ policy or guidance documents that define or describe "construction wastes," "demolition wastes," "clean fill," and "industrial wastes."

b. All DEQ policy or guidance documents that discuss ground glass in the context of "construction wastes," "demolition wastes," "clean fill," and "industrial wastes."

c. All documents pertaining to DEQ's staff inspection of Grabhorn's facility on October 2, 2007.

d. All DEQ documents concerning its investigation or assessment of the ground glass observed at Grabhorn's facility on October 2, 2007 as industrial waste.

e. Any other Warning Letter, Pre-Enforcement Notice or Notices of Violation issued by DEQ in which DEQ contended that ground glass was a non-permitted "industrial waste."

f. All DEQ policy or guidance documents that define or describe "working face."

g. All DEQ policy or guidance documents that instruct or relate to the measurement of a "working face."

h. All documents pertaining to DEQ's staff inspection of Grabhorn's facility on October 2, 2007 [this is a repeat; see item c above].

i. All computations, communication and other documents related to DEQ's measurement of the working face at Grabhorn's facility, as observed on October 2, 2007.

j. Any other measurements of working faces by DEQ of any facility.

k. Any other Warning Letter, Pre-Enforcement Notice or Notices of Violation issued by DEQ in which DEQ contended that a facility's working face exceeded the permit.

l. All DEQ guidance documents or manuals regarding the conduct of or decisions regarding enforcement proceedings or priorities.

m. All DEQ enforcement letters and orders alleging violations of financial assurance requirements for any landfill.

n. All Financial Assurance program guidance documents including all versions from 1991 through the present.

Petition at 7-8. Ms. Kellington indicates that her May 2008 requests sought records in these categories. But the chronology provided by Ms. Kellington acknowledges that DEQ believed ten of the categories of records were requested for the first time on December 9, 2008, and that Ms. Kellington agreed with respect to seven of the categories by letter dated December 29, 2008. Petition at 4-5. In the list above, those seven categories of documents appear as items a, b, e, f, g, j, and k. The additional records that DEQ believed were requested for the first time appear as items l, m, and n; in her letter of December 29, 2008, Ms. Kellington argued that her request on May 13, 2008 encompassed those three categories of records.

We begin with categories c, d, h (which is redundant of c), and i, which both DEQ and Ms. Kellington agree fall within the scope of Ms. Kellington's May 2008 records requests.[9] With respect to those categories, DEQ states that Ms. Kellington has received all responsive, non-exempt documents in DEQ's custody. We consequently deny Ms. Kellington's petition with respect to categories c, d, h, and i. She has not been denied the right to inspect those records.

We turn to categories l, m, and n. These are the categories of records that DEQ believes were first requested on December 9, 2008, but Ms. Kellington believes fall within the scope of her May 2008 requests. We agree with DEQ. Ms. Kellington's earlier requests did seek some documents related to the "Financial Assurance" program. But that request appears to seek records "for, by or between all Oregon Municipal Solid Waste Landfills from 2004 to the present."[10] Categories l, m, and n, which repeat language Ms. Kellington used in her December 9, 2008 letter, are significantly different. They are not restricted by type of landfill; the only date restriction (in category m) refers to 1991 rather than 2004, and the general guidance documents

[9] We do not precisely agree with Ms. Kellington's indication that she requested the documents in categories c, d, h, and i in May of 2008. It is more accurate to say that her requests in May of 2008 were broad enough to ***encompass*** those documents – along with a potentially enormous volume of other records that so much as mention her client. Had she specifically requested documents in those particular categories, it seems very likely that she would have received a swifter response from DEQ. Although the Public Records Law entitles requesters to make extremely broad requests, doing so will usually result in lengthier response times.

[10] Ms. Kellington's original request for Financial Assurance documents was made in a single sentence containing five clauses and eight commas. It is ambiguous whether Ms. Kellington actually meant for the quoted clause (which comes at the end sentence) to modify all of the clauses that precede it. Ms. Kellington's present position suggests that was not her intent. But it is clear that DEQ consistently viewed the original request as limited to records from 2004 forward, and limited to documents with a connection to specific landfills. Thus the June 24, 2008 estimate provided to Ms. Kellington states: "This request requires that staff * * * review all of their * * * documents * * * ***for approximately 49 landfills throughout Oregon***, both municipal solid waste and municipal demolition waste. This request ***does not include financial assurance public records for wood waste landfills or other types of industrial landfills***" (emphasis added). We believe that was a reasonable understanding of Ms. Kellington's May 13, 2008 request. Indeed, that appears to be the best understanding of the grammar of the sentence. At any rate, it clearly was the understanding that DEQ relied on to generate its fee estimate of $6750, and Ms. Kellington did not clarify her intention in response to that estimate.

listed in categories l and n are unlikely to be documents "for, by or between" any Municipal Solid Waste Landfills, but rather documents for DEQ internal use. Thus the request for documents in those three categories was first made on December 9, 2008. By her letter of December 29, 2008, Ms. Kellington stated her unwillingness to prepay any additional fees for the production of those documents. As noted above, "[a] public body may require prepayment of its estimated charges before taking further action on a request." MANUAL at 15. We therefore deny Ms. Kellington's petition with respect to categories l, m and n.

The remaining question is whether DEQ has constructively denied Ms. Kellington access to the documents in categories a, b, e, f, g, j and k. On February 27, 2009 DEQ sent an email to Ms. Kellington. That email estimated the cost of providing the relevant records to be $2,000, based on an expected fifty hours of staff time plus copying costs.[11] This response came approximately two months after Ms. Kellington's December 29, 2008 letter agreeing that these records were first requested on December 9, and stating Ms. Kellington's willingness to pay lawful fees. Although that is a very long time for a fee estimate, we cannot conclude that the delay amounts to a constructive denial. A number of factors explain that conclusion, including

- The breadth of the relevant public records requests;
- DEQ's need to decide on a way to proceed in light of Ms. Kellington's indication that she would not prepay fees for records requested at the same time as these records;
- The fact that DEQ's staff has been busy responding to Ms. Kellington's other public records requests, which may be even broader than the December 9, 2008 requests;
- The necessity to coordinate an estimate between a number of DEQ branches; and
- The fact that DEQ has now provided an estimate and affirmed its intention to make the records available.

In light of those factors, we cannot conclude that DEQ has constructively denied Ms. Kellington's December 9, 2008 request for records.

IV. Omitted Documents and Attachments

Nearly half of Ms. Kellington's petition discusses various documents and attachments that she asserts DEQ neglected to disclose in response to her records requests. The petition identifies, by our count, 148 documents that Ms. Kellington believes DEQ has failed to disclose.[12] Petition at 8-23. As previously noted, DEQ has provided Ms. Kellington with over

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[11] DEQ's February 27, 2009 estimate includes the documents described in categories l, m and n.

[12] We express no opinion as to whether any particular document she describes actually exists. We do note, however, that a number of the entries on pages 8-23 of the petition appear to request records rather than actually asserting that a responsive record has been omitted: p. 9, Exhibit 12; p. 15 items "W" and "Y(i)"; p. 19 items "A(1)," "A(2)(a)," "A(2)(b)," and "A(3)"; p. 20 item "(8)" and p. 21 item "(22)(b)." We also observe that many of the omissions Ms. Kellington identifies are duplicative of one another; *see* note 3. It is possible that Ms. Kellington has, in fact, received copies of some, many or most of the documents she identifies, at least to the extent that they are responsive to her actual requests and not exempt, *see* note 16.. In view of the scope of Ms. Kellington's request, however, we

10,000 copies of unique documents, and likely between 17,000 and 21,000 total copies. If this petition were the first time that these possible oversights had been brought to DEQ's attention, we would easily conclude that any oversights reflected in the documents Ms. Kellington identifies were reasonably to be expected in light of the breadth of Ms. Kellington's requests for records and the corresponding complexity of responding. The requirement that agencies provide "proper and reasonable opportunities for inspection" does not contemplate that agencies must provide perfect and comprehensive responses to large public records requests on the first try. Consequently, we would be unable to conclude that these possible oversights constructively denied Ms. Kellington access to those records.

However, Ms. Kellington initially notified DEQ of apparent oversights in a letter dated December 9, 2008. In that letter she identified, by our count, 83 specific documents that she believed DEQ had failed to provide. December 9, 2008 letter at 3-10.[13] Ms. O'Brien informed Mr. Kron that DEQ began the process of reviewing Ms. Kellington's claims shortly after receiving the December 9, 2008 letter. But DEQ soon halted that process on the belief that additional fees should first be collected from Ms. Kellington.

It is true that DEQ was authorized to charge Ms. Kellington for the actual cost of responding to her public records requests. And it may be true that DEQ could have required Ms. Kellington to ***prepay*** an additional amount in order to follow up on Ms. Kellington's assertion that DEQ had overlooked certain records responsive to her May 2008 records requests. We need not decide that issue, however, because DEQ did not inform Ms. Kellington that it would impose any such requirement. Effectively, DEQ ignored Ms. Kellington's December 9, 2008 letter identifying documents that Ms. Kellington believed DEQ had failed to provide her. Given that more than three months have now passed without any response by DEQ, and that ten months have passed since Ms. Kellington's May 2008 requests, we are forced to conclude that DEQ has constructively denied Ms. Kellington the right to inspect any such records.

To the extent that Ms. Kellington's December 9, 2008 letter correctly identifies specific documents that DEQ neglected to disclose in response to her May 2008 records requests, we order DEQ to disclose those records to Ms. Kellington. In doing so, DEQ may refuse to disclose any record or information that DEQ believes is exempt from disclosure under the Public Records Law.[14]

Our order does ***not*** extend to any documents specifically identified in the petition that are not specifically identified in the December 9, 2008 letter. Although Ms. Kellington is entitled to

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think it is likely that at least some of the documents she identifies were overlooked by DEQ and are subject to being disclosed to Ms. Kellington under the Public Records Law.

[13] Again, a handful of these entries actually appear to request documents rather than noting omitted documents.

[14] Because DEQ has agreed to review the possible oversights identified by Ms. Kellington without charge, we need not decide whether DEQ can require Ms. Kellington to prepay additional fees after already collecting a $6750 prepayment for her May 2008 requests.

inspect any records inadvertently withheld, we cannot conclude that DEQ has constructively denied Ms. Kellington the right to inspect those records. Instead, we accept DEQ's explanation that any omissions were oversights in the course of responding to her extensive public records requests. DEQ has indicated to us that it will review Ms. Kellington's petition to identify any oversights.

Our order also does ***not*** extend to documents that Ms. Kellington listed in her December 9, 2008 letter that Ms. Kellington had not requested in May.[15] And our order does not extend to any documents actually provided by DEQ to Ms. Kellington.[16] Finally, our order does ***not*** extend to the fourteen categories of records that Ms. Kellington identified in her December 9, 2008 letter, which we resolved in section III, above.

V. Redactions without Claim of Exemption

Ms. Kellington's petition lists 68 documents that were redacted by DEQ without explanation of the redaction. Petition at 23-27. These documents include 57 "composition notebooks," 9 emails, 1 set of notes from a staff meeting, and a single entry "Intentionally left blank." Petition at 24-27. "A public body should inform the requester when it is disclosing less than all of the information requested and state the reason for nondisclosure." MANUAL at 105. Here, DEQ has explained to us that it removed material that is not related to Ms. Kellington's request – that is, the unexplained redactions are not "information requested" by Ms. Kellington.

With respect to the "composition notebooks," DEQ indicates that those are effectively day-timers, or daily journals, used by DEQ personnel. The excerpts that Ms. Kellington provided in connection with her petition confirm that characterization. DEQ views the separate entries in these books as separate records. They are created at different times, and relate to different duties (and personal tasks) of the person maintaining the notebook. We agree with DEQ that separate entries are properly treated as separate records under the public records law. Thus DEQ was not required to provide Ms. Kellington with copies of entries unrelated to her public records request.

Apart from the composition notebooks, Ms. Kellington identifies ten documents where pages were not provided or redactions were made. Those are exhibits 1, 19, 20, 26, 28, 37, 41, 59, 60 and 67. Petition at 23-28. DEQ informs us that missing pages either were not intentionally withheld, or contain no substantive information. With respect to exhibit 1, DEQ reports that it redacted certain financial account information on one side of a two-sided copy, and information on the other side (the end of the word "Cascades" and the beginning of "e.g.") was accidentally affected. The pages Ms. Kellington apparently did not from exhibits 19 and 37 are

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[15] For example, at page 5 of her December 9, 2008 letter, Ms. Kellington notes that a document she had previously received "references * * * a binder known as the 'Bible'" and proceeds to ask for a copy. That document may not fall within the scope of Ms. Kellington's May, 2008 requests as DEQ reasonably understood them, *see* note 10.

[16] For example, DEQ reports that data copies of items (A) through (T), Letter of December 9 at 3-5, were provided to Ms. Kellington prior to December. DEQ also reports that it has now provided paper copies of those documents.

duplicative in that she received other email chains containing the missing documents; DEQ states that it did not intentionally withhold those pages from those exhibits. With respect to exhibits 26 and 28, the "missing" final page of a document was a blank sheet with only a heading on the top, a phenomenon that many computer users will recognize as familiar. Exhibits 41, and 67 are similar except that some part of the signature block from the previous page also appears on the missing pages. We are informed that DEQ has made available Ms. Kellington copies of exhibits 1, 19, 20, 26, 28, 37, 41, and 67 that correct the omissions. Her petition is moot with respect to those documents. With respect to exhibit 59, DEQ reports that it does not possess the page Ms. Kellington is seeking; its files contain the document as originally provided. With respect to exhibit 60, DEQ reports that the page it did not provide contains no information responsive to Ms. Kellington's request. Specifically, the page contains a "doodle" by a DEQ employee of a woman wearing a basket on her head. Ms. Kellington is not entitled to an order compelling DEQ to provide those documents.

VI. DEQ's Claims of Exemption

Finally, Ms. Kellington's petition objects to documents affirmatively withheld by DEQ on the basis of an exemption under the Public Records Law. We understand that DEQ has informed Ms. Kellington that the majority of those documents are now available for her inspection. As to the records disclosed by DEQ, we deny Ms. Kellington's petition as moot. Of the records still withheld by DEQ, all but a few have been withheld on the basis of the lawyer-client privilege, which is codified at ORS 40.225. DEQ has also withheld two emails and an early draft of an enforcement document that was eventually finalized and sent to Grabhorn, and redacted information from one additional email, on the basis that the information withheld is an internal advisory communication and exempt from disclosure under ORS 192.502(1).

We have reviewed the remaining documents withheld on the asserted basis of the lawyer-client privilege. We are satisfied that the documents in fact contain "communications made for the purpose of facilitating the rendition of professional legal services to the client" and that the communications were "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services," ORS 40.225. Such confidential communications are exempt from disclosure under ORS 192.502(9).[17] Ms. Kellington notes that ORS 192.505 requires public agencies to segregate exempt and non-exempt material, Petition at 27-28. Given the scope of the lawyer-client privilege, only information unrelated to the provision of legal services to the client would arguably be subject to such a

[17] In Ms. Kellington's letter to Ms. O'Brien at DEQ on June 25, 2008, Ms. Kellington mischaracterized the nature of recent (2007) changes to ORS 192.502(9). Specifically, Ms. Kellington: (a) indicated that those changes related generally to "claims of confidentiality or privilege"; and (b) stated that "all facts and factual assumptions must be disclosed * * * and with limited exception only certain legal advice is exempt." In fact, the changes (a) relate only to the lawyer-client privilege, and (b) ***only*** implicate circumstances involving investigations "in response to information of possible wrongdoing ***by the public body***" and do not apply at all where the information is "compiled in preparation for litigation, arbitration or an administrative proceeding." ORS 192.502(9)(b)(C) and (D) (emphasis added).

requirement.[18] Apart from information concerning the author, recipient, and date of the communications, which DEQ has provided to Ms. Kellington in the form of a privilege log, our review indicates that redacting whatever non-exempt information may be contained within these documents would result in the creation of documents that would be either entirely redacted, or so thoroughly redacted as to be essentially meaningless.

We turn to the information withheld as "internal advisory communications" exempted by ORS 192.502(1). For this exemption to apply to the withheld information, DEQ must show that

- it is a communication within a public body or between public bodies;
- it is of an advisory nature preliminary to any final agency action;
- it covers other than purely factual materials; and
- in the particular instance, the public interest in encouraging frank communication clearly outweighs the public interest in disclosure.

MANUAL at 58-59. The first three criteria are clearly met with respect to all material that DEQ has withheld. Specifically, the material reflects internal communications at DEQ, and discusses how DEQ should proceed with respect to the pending Grabhorn matter – discussions that are both preliminary and non-factual.

The remaining question is whether the public interest in encouraging frank communication clearly outweighs the public interest in disclosure. The MANUAL contains a detailed discussion of this issue at pages 60-64. In our view, the most pertinent part of that discussion relates to Public Records Order, March 30, 1989, Howser:

> [W]e concluded * * * that the public interest in allowing the Oregon State Bar to exchange frank comments and recommendations concerning proposed disciplinary action would be seriously undermined if the accused attorney could obtain access to the candid analysis of the charges, strategies and recommendations on the disposition of the charges during the pendency of the disciplinary proceedings.

MANUAL at 62. The same analysis applies to the information withheld by DEQ here. As previously described, the information consists of an early draft of an enforcement document that was eventually finalized and sent to Grabhorn, and email discussions of how DEQ should proceed in the enforcement proceedings. Allowing Grabhorn access to frank discussions by DEQ staff regarding the proper charges and penalties to pursue, and the best strategies for pursuing them would undermine the public's interest.[19] Conversely, Ms. Kellington has not

[18] At least where the documents in question are not affected by the 2007 changes to the Public Records Law discussed at note 17, above.

[19] We note that, where any chilling effect may be dubious, DEQ has disclosed strategy information. For example, DEQ has disclosed to Ms. Kellington an email discussion regarding whether and to what extent DEQ should raise the issue of Mark Reeves's former position with DEQ. And DEQ has disclosed later drafts of enforcement documents that do not reflect DEQ staff's frank consideration of how DEQ will approach the pending enforcement matter.

offered any reason to think that there is an equally compelling public interest in favor of disclosure. It appears that the primary interest served by disclosure would be her client's private interest in obtaining access to this information for use in the pending administrative proceeding. The public interest in encouraging frank communication within DEQ on enforcement matters clearly outweighs any public interest in disclosure that we can perceive. It follows that the material withheld by DEQ is exempt under ORS 192.502(1).

CONCLUSION

For the reasons described above, Ms. Kellington's petition is granted in part, and respectfully denied in part.

As more thoroughly described in section V above, DEQ is hereby ordered to provide Ms. Kellington with any records that Ms. Kellington correctly identified in her December 9, 2008 letter to DEQ as having been mistakenly withheld by DEQ in responding to Ms. Kellington's March 2008 public records requests. Under ORS 192.450(2), DEQ has seven days to comply.

Ms. Kellington's petition is otherwise respectfully denied.

Sincerely,

Mary H Williams

MARY H. WILLIAMS
Deputy Attorney General

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