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March 10, 2009

Clifford Earl Bartz
#17743-018
FCI Schuylkill
P.O. Box 759, Unit 1-B
Minersville, PA 17954-0759

Re: Petition for Review of Denial of Fee Waiver:
Office of Secretary of State, Archives Division

Dear Mr. Bartz:

This letter is the Attorney General's order on your petition for review of the denial by the Office of Secretary of State, Archives Division ("Archives"), of your request for a waiver of fees under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on March 5, 2009, states that you are unable to pay the required fees. For the reasons that follow, we respectfully deny your petition.

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). A public body may require pre-payment of estimated fees before acting on a request. ATTORNEY GENERAL'S PUBLIC RECORDS AND PUBLIC MEETINGS MANUAL (2008) ("MANUAL") at 15. ORS 192.440(5) authorizes a public body to waive fees if it determines that the waiver is in the public interest.

We spoke with Austin Schulz at Archives about your request for a fee waiver. In its February 17, 2009 letter, Archives informed you of the costs for certified and non certified copies of each Oath of Office requested. The letter also informed you that you could contact the Oregon Department of Justice for information about the fee waiver process. For your convenience, the agency provided you with our address. When we spoke to Mr. Schulz, he told us that Archives intended to deny your request for fees.

The initial decision to grant or deny a fee waiver rests with the agency from which records are requested. Agencies must engage in a three step analysis to determine whether to grant a fee waiver. First, an agency must determine whether a waiver or reduction of fees is prohibited by law. For example, a waiver could be prohibited because a public body's funding for a particular program is statutorily or constitutionally dedicated to purposes that do not include responding to records requests. MANUAL at 17.

If a waiver is not prohibited the agency then proceeds to the second step, which is to determine whether granting a reduction or waiver of fees is in the public interest "because making the record available primarily benefits the general public." ORS 192.440(5). The Oregon Court of Appeals has determined that a matter is in the public interest "when it affects the community or society as a whole, in contrast to a concern or interest of a private individual or entity," and that a matter primarily benefits the public "when its most important or significant utility or advantage accrues to the public." ***In Def. of Animals v. Or. Health Scis. Univ.***, 199 Or App 160, 188-89, 112 P3d 336 (2005). Some of the things an agency may consider when determining whether a requester has demonstrated a sufficient public interest include, but are not limited to: the requester's identity, the requester's purpose for use of the information, the character of the information, whether the information is already in the public domain, whether the requester has the ability to share the information with the public, and the requester's inability to pay the fee. MANUAL at 20. When necessary, agencies can ask the requester for additional information to clarify the basis of the requester's claim for a fee waiver. *Id.* at 20.

Even if the agency determines that the requester has demonstrated a sufficient public interest, the agency is not required to grant a fee reduction or waiver. ***In Def. of Animals***, 199 Or App at 189. Thus, the agency's decision whether to grant a fee waiver or reduction is the third step. The agency enjoys discretion in making this decision, but a denial of a fee reduction or waiver must be reasonable considering the totality of the circumstances. MANUAL at 20. Some of the factors an agency may consider when exercising its discretion are: financial hardship to the agency, the extent of time and expense and interference with the business of the agency, the amount of records requested, the need to segregate exempt from non exempt records, and the extent to which an inspection of the records is insufficient for the public interest or for the particular requester's needs. *Id.* at 21.

Under ORS 192.440(6), a "person who believes that there has been an unreasonable denial of a fee waiver * * * may petition the Attorney General * * * in the same manner as a person petitions when inspection of a public record is denied." The Attorney General reviews each denial of a fee waiver on a case-by-case basis to determine whether there has been an "unreasonable" denial of a fee waiver or reduction. ORS 192.440(6); MANUAL at 21. We have concluded previously that a "personal benefit to be derived by the requester alone is insufficient to permit a fee waiver." MANUAL at 19.

Here, Archives had the authority to reduce or waive fees for responding to your records request only if it determined that doing so was in the public interest "because making the record available primarily benefits the general public." ORS 192.440(5). In your March 3, 2009, letter you requested a waiver based solely on your inability to pay the fees. You have not asserted that

disclosure of the records you requested will serve the public interest. While financial inability to pay is a factor for a public body to consider, standing alone it is an insufficient basis upon which to grant a fee waiver. MANUAL at 20.

Based on the information provided, we do not perceive a basis upon which Archives could have concluded that waiving its fee would primarily serve the public interest. Thus, the decision not to waive its fee was reasonable. Accordingly, we deny you petition. Our decision does not prevent you from reasserting your request and providing more information to Archives if you believe that waiving the fee would, in fact, primarily serve the public interest.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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