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February 26, 2009

SENT VIA REGULAR MAIL & E-MAIL

William T. Harbaugh
538 PLC
1285 University of Oregon
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(wtharbaugh@gmail.com)

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

Dear Dr. Harbaugh:

On February 9, 2009[1] you emailed the Attorney General seeking a Public Records Order directing the University of Oregon (UO) to waive a $10 fee for public records, and asking the Attorney General to require UO to accept payment of public records fees via electronic means. The fee in question relates to your request for "any one document showing when UO's 2008 Affirmative Action Plan was transmitted to, or signed by, UO President Frohnmayer." We must respectfully deny your petition.

We start with your request that we direct UO to accept payment of public records fees via electronic means. You assert that UO's refusal to do so is a "transparent strategy to delay access to public records." We simply cannot see any authority in the Public Records Law for the Attorney General to dictate that UO accept payment via electronic means. We are willing to assume that electronic payment may be somewhat faster in some circumstances; therefore, accepting such payments could facilitate at least marginally faster access to public records. But we do not believe that the Attorney General's statutory authority to review public records

[1] Your petition was misrouted within the Department of Justice, and an Order was not timely issued. On February 24, 2009, you inquired about the status of your petition, and authorized a "retroactive extension" to February 26, 2009. We thank you for that courtesy, and apologize for our mistake.

decisions by state agencies plausibly extends to requiring agencies to adopt electronic billing practices for public records fees.

We turn to your request that we order UO to waive its fee in this instance. You assert that there is a public interest in the record that you have requested; as noted, that record is "any one document showing when UO's 2008 Affirmative Action Plan was transmitted to, or signed by, UO President Frohnmayer." You support your position that there is a significant public interest in the record:

> UO's continued failure to update its AA plan on the required annual cycle has resulted in several newspaper stories. It has also been the subject of an OFCCP investigation. I am currently working with a reporter who is interested in a more substantial article, dealing with that investigation and President Frohnmayer's continued backdating of these plans.

Your petition goes on to state, "If you believe this sort of public interest and attention is not sufficient to waive a $10 fee, I would like to know what standard your office intends to apply."

We agree with you that you have articulated a public interest that is "sufficient" to permit UO to waive a $10 fee. However, "even if the public body determines that the requestor meets [the test for fee waiver], 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 v. Oregon Health Sciences University***, 199 Or App 160, 189-90, 112 P3d 336 (2005). Thus, although we agree that you articulate a public interest that is sufficient to permit UO to waive its public records fee, that is not the question that we must address.

Instead, we must determine whether "there has been an unreasonable denial of a fee waiver." ORS 192.440(6). According to the Oregon Court of Appeals, "Reasonableness is an objective standard, under which we examine the totality of the circumstances presented." ***In Defense of Animals***, 199 Or App at 190. According to the ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) ("MANUAL"), relevant factors include

> any financial hardship on the public body, the extent of time and expense and interference with the business of the public body, the volume of the records requested, the necessity to segregate exempt from non-exempt materials, and the extent to which an inspection of the records is insufficient for the public interest or for the particular needs of the requester.

MANUAL at 21. In previous Orders addressed to you, the Attorney General's Office has long viewed the overall volume of your public records requests as relevant to assessing the burden of your requests on UO. *See, for example*, Public Records Order, March 18, 2008, Harbaugh (citing previous Orders in which the Attorney General's office has expressed the same view). Seen on its own, waiving or reducing a $10 fee would not create a financial hardship for UO.

But viewed with all of your public records requests, it is clear that you create a significant expense to UO and interfere significantly with UO's business.

We acknowledge that a number of factors listed in the MANUAL weigh in favor of a fee waiver or fee reduction – you have requested a single record, there's no apparent need to segregate exempt and non-exempt materials, and inspection is impractical considering that you are overseas. But so far as we are aware, you are the single most prolific requester of public records in this state, perhaps in the entire history of the state. Although the number of requests that you have made does not deprive you of the statutory right to inspect public records, we continue to believe that it is highly relevant to evaluating the reasonableness of UO's decisions when you request fee waivers. That consideration may not be decisive in every instance, but in this case we do not see that the $10 fee significantly impedes the public's interest in disclosure of the record you are seeking. Overall, we cannot conclude that UO's decision was unreasonable.

Your petition is respectfully denied.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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