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March 18, 2008

SENT VIA E-MAIL & REGULAR MAIL

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Re: March 5, 2008 Petition for Review of Denial of Fee Waiver:
University of Oregon Records (Documents re: tax exempt bond issue)

Dear Dr. Harbaugh:

On March 5, 2008, we received your email asking the Attorney General to "order [the Attorney General's] Special Assistant Attorney General Melinda Grier to produce [various] documents promptly and without charge." We treat the email as a petition under ORS 192.440(6) to review the denial of a fee waiver request. The documents in question are "1) copies of any UO or OUS documents, reports, memos or letters dealing with the issue of the tax-exempt status of the proposed arena bond sale; and, 2) copies of any emails to or from the email address grierm@uoregon.edu, or any other state email addresses used by UO General Counsel Melinda Grier, containing all the words 'tax exempt bonds' and or all the words 'tax arbitrage' dating from January 1, 2007 to present." For the reasons that follow, we respectfully deny your petition.

On March 5, 2008 the University of Oregon (University) provided an estimate of the fees that would be incurred in responding to this request. The total estimate was $698.92. For only the first set of documents, the University provided an estimate of $239.46. For only the second set, the estimate was $459.46. The University offered you a discount of 25% from those amounts, but otherwise denied your request that it entirely waive its fees. You have not paid any amount, and we are informed by the University

that work on compiling any requested documents will not begin until the University receives payment of the applicable fee.[1]

Pursuant to ORS 192.440(5), "[t]he custodian of any public record may furnish copies without charge or at a substantially reduced fee if the custodian determines that * * * making the record available primarily benefits the general public." And ORS 192.440(6) permits "a person who believes that there has been an unreasonable denial of a fee waiver or fee reduction" to petition the Attorney General for relief, and authorizes the Attorney General to issue an order granting or denying the petition, in whole or in part. When responding to such a petition, we employ a two-part analysis. *See*, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) (MANUAL) at 17-21.

The first step is to determine whether "making the record available primarily benefits the general public" such that a waiver would be authorized under ORS 192.440(5). We have no trouble concluding that waiver would be authorized in this instance. First, we can see no significant personal interest that would be served by disclosure of the requested records. Second, we agree with you that the public has an interest in information concerning a sizable state bond offering, particularly if there is a possibility of "substantial tax payments and perhaps penalties" as you suggest. Finally, as we have noted in prior orders, you have a record of publication that confirms your ability to make such information available to the public. *See*, e.g., Public Records Order, February 6, 2008, Harbaugh. As a result, the University could permissibly waive the fees associated with your request, and did not overstep itself by offering you a 25% discount.

If an agency could choose to waive its fees but declines to do so, the second step of our analysis is to determine whether the decision to insist on the fee (or some portion of it) was reasonable "under the totality of the circumstances presented." ***In Defense of Animals v. OHSU***, 199 Or App 160, 190, 112 P3d 336 (2005). This second inquiry is necessary because even where the disclosure would serve the public interest, ORS 192.440(5) *permits* agencies to waive their fees without *requiring* them to do so. The statute provides that a custodian "*may* furnish copies without charge or at a substantially reduced fee" (emphasis added). *See*, ***In Defense of Animals***, 199 Or App at 189 (decision whether to waive public record fee is discretionary). Our examination of "the totality of the circumstances presented" by your request reveals the reasonableness of the University's insistence that you pay 75% of its fee.

We begin by acknowledging two circumstances that would tend to favor a fee waiver. The first is one that we have already mentioned: the public interest in

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[1] The portion of your petition that requests an order of "prompt" disclosure may imply that the University has not provided you with a "reasonable opportunity for inspection" of the documents in question, as required by ORS 192.430(1). We interpret that provision as requiring agencies to provide access to documents or else deny requests within a reasonable time. Because the University may require you to pay its fee before undertaking the work necessary to respond substantively to your request, MANUAL at 15, we could not say that the University has exceeded a reasonable time to respond.

information concerning a sizable state bond offering. The second is that the fee itself, whether considered all together or broken down into its component parts, is fairly substantial considering that you are a private individual without a significant personal interest in the release of the documents. The fee at least marginally impedes the public's interest in disclosure.

However, several other relevant circumstances support the reasonableness of the University's decision.

First, there is a very strong likelihood that a very large proportion of the documents responsive to your request will be protected by the lawyer-client privilege, ORS 40.225, and therefore exempt from disclosure under ORS 192.502(9). The legal issues surrounding issuance of state bonds are complex, and likely to be substantively addressed by attorneys. Both subsets of the documents that you are seeking address those issues, and we consequently believe that responsive documents are very likely to be exempt from disclosure. That likelihood is particularly high with respect to the second subset of requested documents (those emailed to or from state email accounts used by Ms. Grier), as Ms. Grier acts as attorney for the University. But even with respect to the first subset of documents, we believe it is more likely than unlikely that a responsive document of substantive value will turn out to be exempt from disclosure under the lawyer-client privilege. The fact that documents you ultimately receive are likely to be either non-substantive or else heavily redacted significantly diminishes the public interest in the disclosure.

Second, the necessity of reviewing documents is apparent from the nature of the request. Such review guards exempt documents against disclosure and protects applicable privileges. This necessity accounts for the better part of the estimated fee. In a nutshell, the situation is: (1) you have asked the University to disclose documents that will obviously require segregation and/or redaction of exempt material; (2) the necessary segregation/redaction will likely diminish the public interest in disclosure, as substantive materials appear likely to be exempt; and (3) you seek to have the University waive the cost to it despite the uncertain public utility of the overall endeavor necessitated by your request. We fail to see how it is unreasonable for the University to insist that you pay for 75% of the cost to the University for work that, although it serves the public's general interest, is ultimately of uncertain social utility and diverts University resources.

The work created by your request in turn also relates to our repeated observation that the University can reasonably consider the extraordinary volume of your public records requests when it considers your waiver requests. *See*, Public Records Order, February 6, 2008, Harbaugh; Public Records Order January 31, 2008, Harbaugh; Public Records Order August 29, 2007, Harbaugh. Under the Public Records Law, you are free to submit any number of requests. The University is, however, authorized to consider the total volume of these requests in the context of determining whether it is reasonable for the University to deny your request for a waiver of fees. In the absence of your request, the University's resources would be available for other tasks. Although the diversion of resources caused by this particular request may not be great when viewed in isolation, we

believe that the composite history of your public records request – along with the likelihood of further requests in the future – is properly considered among the "totality of the circumstances" in which this request was made.

Next, we note that the final status of the bonds has not yet been determined. Your email raises the specter that the bonds "might be declared 'arbitrage bonds' by the IRS, which would expose the state to substantial tax payments and perhaps penalties." For this to happen, the bonds would first need to be issued as federal income tax exempt bonds, a future event as to which you are speculating. Even if the bonds are ultimately issued in that form, the bond issue would be preceded by the review of the state's bond counsel, and a formal opinion endorsing that result. In other words, there is already a process in place to protect against the negative consequences that you invoke. Although this does not negate the public's interest in the issues that you raise, it again diminishes the strength of the public's interest in these documents. We do not suggest that public debate should not occur, or that the public should not be informed as to these issues. But the mechanism assuring independent expert analysis of these issues provides yet another basis for the University to reasonably conclude that collecting 75% of the costs it incurs will not unreasonably limit the public interest served by this disclosure.

Finally, we note that we have generally found fee waivers of 25% to be reasonable. See, MANUAL at 21, footnote 72 (citing numerous Public Records Orders). In light of the factors described above, we do not see a reason to decide this petition differently than other petitions in which we have concluded that a 25% fee reduction is reasonable.

ORS 192.440 (5) and (6) require this office to apply the two-part analysis set out above to petitions for Public Records Orders overturning an agency's refusal to waive all fees. We are not free to disregard the law in favor of a petitioner's, an agency's, or our own view of the merits or demerits of a policy choice made by the Legislative Assembly and embedded in law. Nor, provided the agency acted reasonably, are we free to impose a fee waiver on an agency.

We respectfully deny your petition.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

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c: Melinda Grier, UO