HARDY MYERS
ATTORNEY GENERAL

PETER D. SHEPHERD
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400
TTY: (503) 378-5938

March 13, 2008

SENT VIA E-MAIL & REGULAR MAIL

William T. Harbaugh
Department of Economics
1228 University of Oregon
Eugene, Oregon 97403
wtharbaugh@gmail.com

Re: March 6, 2008 Petition for Review of Denial of Fee Waiver:
University of Oregon Records (ECONorthwest Report)

Dear Dr. Harbaugh:

On March 6, 2008, we received your petition seeking "a retroactive waiver of the $26.70 in fees * * * for a copy of the ECONorthwest arena report" provided to you by the University of Oregon ("University"). We addressed your petition for a waiver of these fees in an order dated February 6, 2008. As a result, we treat your petition of March 6 as a request for reconsideration of our previous order.[1] We ultimately decline to reconsider our previous order.

Before we can reach the substantive merits of your March 6 petition, we must answer two threshold questions. First, does the Attorney General have authority to reconsider previously issued Public Records Orders? Second, does the Attorney General have authority to order a state agency to refund fees that it has collected if the Attorney General finds that the agency's prior refusal to waive the fee was unreasonable? We answer both questions in the affirmative.

In determining that the Attorney General has authority to reconsider previously issued Public Records Orders, we begin by observing that the Attorney General has previously revised Public Records Orders when subsequent submissions have demonstrated to the Attorney

[1] Because we view your request as asking us to reconsider our previous order, we need not consider whether the University's silence in response to your request that it retroactively waive fees constitutes an implied refusal. The University explicitly refused to waive the fees at issue, and we see nothing in the Public Records law that would require the University to reconsider a waiver request previously denied or respond to a request that it do so.

General's satisfaction that revision is appropriate. *See, for example*, Public Records Order (Revised), October 23, 2007, Millstein.

This practice is in keeping with the general rule that state agencies have inherent discretionary authority to reconsider decisions within their competence. In ***Grossman v. DMV***, 183 Or App 623, 629-630, 54 P3d 629 (2002), the court of appeals affirmed that principle, noting that it expires only when the period for seeking review of the order has elapsed. The statutes are not explicit regarding the timeframe within which public records requestors must seek judicial review of the Attorney General's order. In light of that silence, we conclude that the shortest timeframe potentially applicable would be the sixty day period provided by ORS 183.484(2) for "judicial review of orders other than contested cases." Your March 6 petition was received 29 days after our February 6 order. Continuing to assume that the sixty day timeframe is applicable, the Attorney General would nevertheless retain inherent authority to reconsider the February 6 order.

We further conclude that the Attorney General has power to order public agencies to return fees in cases where the refusal to waive the fee was unreasonable. ORS 192.440(6) provides that

> A person who believes that there has been an unreasonable denial of a fee waiver or fee reduction may petition the Attorney General or the district attorney in the same manner as a person petitions when inspection of a public record is denied * * *. The Attorney General * * * [has] the same authority in instances when a fee waiver or reduction is denied as it has when inspection of a public record is denied.

Nothing in this language suggests that the petition must be filed before the fee is paid; all that is required is that the requestor believe there "has been" an unreasonable denial. A requestor whose waiver request is denied may decide to pay the fee under protest in order to obtain the documents sought. Such a requestor presumably "believes that there has been an unreasonable denial of a fee waiver." If the requestor were to subsequently file a petition asserting that belief, we do not see a basis in the public records law for rejecting the petition outright. Because agencies may require prepayment of fees, a contrary rule would force petitioners to choose between (a) making payment to obtain the documents and forfeiting any right to challenge the waiver decision or (b) challenging the fee waiver decision without the benefit of documents that could demonstrate a strong public interest in the waiver. Imposing this dilemma on requestors would run contrary to general rule favoring disclosure that underlies the public records law.

Just as important as the lack of limitation on requestor's petition rights is the express grant of authority to the Attorney General. Specifically, the Attorney General has "the same authority" as the Attorney General enjoys under ORS 192.450 with respect to denials of inspection requests. Under the latter statute, the Attorney General has authority to "issue an order denying or granting the petition, or denying it in part and granting it in part." Agencies are required to comply with the Attorney General's orders or else to seek judicial review of those orders. ORS 192.450(2). Because the statutes do not suggest that a petition alleging an

unreasonable denial of a waiver request is barred by payment of the fee under protest, and because the Attorney General has the authority to grant or deny petitions wholly or in part, we conclude that agencies must comply with orders of the Attorney General compelling them to return fee amounts paid following an unreasonable denial of a requested waiver, or else seek judicial review.

Having concluded that we are competent to entertain your request for reconsideration, we turn to the merits of that request. Finding that it lacks merit, we respectfully decline to reconsider our previous order.

You suggest two reasons for reconsidering our previous order. First, you indicate that media and public interest in the underlying documents support your consistent position that a waiver of these fees would serve the public interest. Because we continue to adhere to our previous decision that waiver would primarily serve the public interest (*see*, Public Records Order, February 6, 2008, Harbaugh at 2) we do not believe that this is new information that merits reconsideration of your petition.

Second, you indicate that you learned subsequent to our previous order that the same documents provided to you were also requested by, and provided to, the Eugene Register Guard.[2] Our previous conclusion that the denial of a full waiver denial was reasonable turned on the observation that you make numerous requests of the University. Given the amount of work that is required to respond to your requests, we determined that the University could reasonably decline the requested waiver. *See* Public Records Order, February 6, 2008, Harbaugh at 3. Implicit in that reasoning was the notion that your requests create an extraordinary amount of work for the University relative to requests of other requestors, to the extent that the University may properly consider the overall amount of work created by your requests in analyzing the consequences to the University of waiving fees charged to you. It now appears that the vast majority of work associated with this request would have been required without your request.

Thus, the new information with respect to the Register Guard appears at first glance to undercut the reasoning underlying our previous order. However, closer inspection reveals otherwise. Your request for a waiver was rejected by the University on January 29, 2008. The Register Guard did not request the documents until January 31, 2008. In other words, when it rejected your waiver request, the University did not know that it would be required to do the work regardless of your records request. As the Oregon Court of Appeals has indicated, the task in reviewing denials of fee waivers is to determine whether the waiver denial was reasonable

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[2] You note that the Register Guard paid the same fee that you would have paid in the absence of a $10 discount given to you by the University. You imply that this suggests impropriety with respect to the fees. The University has confirmed that the total amount collected from you and from the Register Guard was less than the actual cost to the University of making the documents available, even accounting for your discount. The University explained that the additional cost to it became apparent prior to the Register Guard's request, but because the University chose not to increase the fee required of you, it did not feel that charging the Register Guard a higher amount would be justified. This effectively means that your discount exceeded the amount stated by the University, and that the Register Guard also received a substantial discount. Were we presented with the issue, we would have no trouble concluding that the public interest in those disclosures authorized the University to grant those fee reductions.

under "the totality of the circumstances presented." ***In Defense of Animals v. OHSU***, 199 OrApp 160, 190, 112 P3d 336 (2005). It is unfair to judge the reasonableness of a decision with reference to factors that were neither known nor susceptible to knowledge at the time of the decision. As a result, the fact that the Register Guard subsequently requested the same document is irrelevant to a determination of whether the University's denial of a complete waiver was reasonable when it was made, and reconsideration on that ground is not warranted. [3]

Your request that we reconsider our order of February 6 is respectfully denied.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS21360
c: Melinda Grier, UO

[3] We note incidentally that the Register Guard's request for this document would diminish somewhat the public interest in disclosure to you, as the parallel efforts of the Register Guard would reduce the public utility of your efforts. Had the University had been aware of the Register Guard's request at the time it rejected your waiver request, that diminished interest would have been appropriately considered as part of the University's reasonable determination as to whether to grant a full waiver of the fee. Of course, because the University did not have such knowledge, this discussion is purely hypothetical.