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

August 7, 2007

Ms. Cindy Ashy
PO Box 1225
Newport OR 97365

Re: Petition for Review of Denial of Fee Waiver
Oregon Watershed Enhancement Board Records

Dear Ms. Ashy:

This letter is the Attorney General's order on your petition for review of the denial by the Oregon Watershed Enhancement Board (OWEB) of your request for a waiver of fees for making available public records under the Oregon Public Records Law, ORS 192.410 to 192.505.

Your petition, which we received on July 30, 2007, asks the Attorney General to order OWEB to waive all fees related to your request for copies of OWEB records concerning you and the MidCoast Watersheds Council (MidCoast).

In pertinent part, the petition states:

> "We need these documents in order to help OWEB's investigation [concerning watershed council issues] as well as suggest changes at the state level and the local level and in fact WE DO NOT FEEL THAT THE INVESTIGATION CAN BE COMPLETELY [sic] FAIRLY WITHOUT US HAVING HAD THE OPPORTUNITY TO REVIEW ALL THE DOCUMENTS WE REQUESTED AND MAKE COMMENT ON THEM.
>
> * * *
>
> "I am asking that the Attorney General please step in and help us get these public documents at no additional cost to us . . . ."[1]

[1]The complete excerpt reads: "I am asking that the Attorney General please step in and help us get these public documents at no additional cost to *as well as the name of the lawyer that [an OWEB official] spoke to in the*

For the reasons below, we respectfully deny your petition.

1. Background

Your petition does not include the public records requests for which you request a fee waiver, nor does it specifically describe those records. OWEB has informed us that the fee waiver request implicitly appears to apply to a number of record requests that you have made over a period of several weeks. On the basis of information OWEB has provided, we have developed the following summary of the requests germane to your petition for a fee waiver:[2]

On May 3, 2007, you requested from Roger Wood of OWEB by email "anything on file at OWEB regarding me from any organization or individual."

On May 7, 2007, you requested from Roger Wood by email "copies of ANY and ALL correspondence regarding me (Cindy Ashy) from any person or any organization to OWEB and/or to any employee of OWEB. This includes email, written letters, and any other correspondence via any other means."

On May 10, 2007, you additionally requested from Ken Bierly of OWEB by email "a complete copy of the Biennial Watershed Council Support Application submitted by the MidCoast Watersheds Council that is currently pending approval." She also requested "all review comments regarding this application and if there were any abstentions."

On May 11, 2007, you additionally requested from Lori Warner-Dickason of OWEB by email all "pre-discussion comments" on the MidCoast application, and in addition: (1) the 2005-07 MidCoast application for the previous biennium; (2) the signed grant agreement for that biennium's application; (3) the grant agreement for MidCoast for the 2007-09 biennium support application; (4) the list of review team participants for the 2005-07 MidCoast support application; and (5) the review team comments for the 2005-07 MidCoast support application.

Some of the foregoing documents were provided electronically to you via emails from Lori Warner-Dickason of OWEB on May 14, 2007. The agency exacted no fee for this response.

On May 29, 2007, in an email directed to Roger Wood of OWEB, you requested copies of "all correspondence including emails, letters, etc. that Mr. Hoffman or anyone else associated with the MidCoast Watersheds Council has given you."

On June 6, 2007, Tom Byler, the executive director of OWEB, responded by letter to the over 20 email contacts from you and numerous phone calls, and enclosed documents responsive to your

---

Attorney General's office." Petition at page two. We consider the italicized text to be a request directed to this office for a public record containing the name of the lawyer. We reply separately to that request.

[2] Some of the requests also requested that OWEB generate written responses to questions posed by Ms. Ashy, which is outside the scope of the Public Records Law.

emails dated May 3, 7, 11 and 29 to various OWEB representatives. Mr. Byler advised that he was waiving the policy to charge for agency staff time and copying costs in this instance but added: "However, please be aware that charges may apply for staff work and copying for additional research and document requests."

On June 12, 2007, you emailed Bonnie Ashford of OWEB and complained that the documents recently supplied by OWEB were not complete. You also requested copies of recordings of your testimony at OWEB board meetings on May 15-16, 2007 and a copy of a recording of Ken Bierly's testimony.

On June 26, 2007, in an email to Bonnie Ashford, you requested nine additional categories of records, including requests for grant proposals, plus all accompanying documents, emails and correspondence, for the following: a Lower Salmon River Estuary grant proposal, all grants for work in the Driftcreek area of the Alsea Basin, "a Driftcreek grant from LSWCD to MCWC," all Lint Slough grants, all grants where Steve Trask, Fran Recht, or Wayne Hoffman were listed as project managers, all grants where Central Coast Land Conservancy was the recipient of all or part of the award. You also requested copies of "all contracts between MCWC, LSWCD and Rennie Ferris and his landscape businesses."

On June 28, 2007, in an email to Bonnie Ashford, you added a request for documents related to The Yaquina Bay Project, and all grants or projects related to the Central Coast Land Conservancy, including all correspondence and attachments.

On June 29, 2007, you acknowledged by email to Bonnie Ashford that you had received 4 emails with 15 attachments, but added a request for two additional documents: the "OWEB approved methodology for self-evaluation" and the "OWEB Assessment Manual."

On July 2, 2007, Bonnie Ashford advised you by email that the OWEB Assessment Manual was available on OWEB's website and furnished the URL.

On July 3, 2007, Tom Byler informed you by letter that requests for additional records would require "significant staff time to compile and copy," and that some of the information you requested was "not easily retrievable and will take time to locate." He advised that OWEB had identified "roughly 200 files that will have to be reviewed to determine if they contain some of the information you seek." He estimated it would take "approximately 45 hours of staff time at $20/hour and 25 cents per page" to cover the OWEB staff costs and copying costs. He invited you to come to the Salem office to review the files and determine which documents you wished to copy, at a rate of ten cents per page, and he reserved a room for two days in July during which you could conduct that review. He also advised that he would not direct staff to create documents to meet your requests for descriptions of conversations concerning you, inasmuch as the Public Records Law does not require a public body to create documents.

On July 9, 2007, Tom Byler advised you by email as follows:

> Last week you asked that I consider waiving fees associated with your request for public documents concerning the Mid-Coast Watersheds Council. OWEB's operations are funded with Constitutionally-dedicated funds under Article XV, Section 4(b) of the Oregon Constitution. Due to the limitations on the use of these funds, OWEB does not have discretion to waive or reduce fees for making records available, unless the cost of charging for the documents would approach or exceed the cost of furnishing the information. I waived fees associated with some of your previous documents requests based on my estimate that the cost of preparing and sending a bill would approach the cost of furnishing you the information. As I explained in my July 3, 2007 letter to you, your more recent records request is large in scope. OWEB costs to furnish you the information would exceed the cost of charging for the documents. Therefore, I cannot waive fees associated with your pending records request.
>
> If you wish to proceed with the records request under the terms I set out above, please email me or Bonnie Ashford.

In a July 9, 2007, e-mail to Tom Byler, you contended that "[w]e have to have the public documents and we should NOT have to pay as it is in the interest of the GREATER PUBLIC GOOD." You maintained that the purpose of the documents was "to affect [sic] much needed positive change in our local watershed council which is now completely corrupt and to affect positive change at the state level which we desperately need."

In a follow-up email to Tom Byler dated July 9, 2007, you cited ORS 192.440(4), which authorizes the custodian of a public record to waive or reduce the fee if the custodian determined that the waiver or reduction of fees was in the public interest because making the record available primarily benefits the general public.

In an email to Tom Byler and Melissa Leoni dated July 13, 2007, you stated in pertinent part: "How dare OWEB refuse to waive the fees associated with distributing public information documents for the VERY LEGITIMATE PURPOSE of BENEFITTING THE GREATER PUBLIC GOOD and REFORMING the MidCoast Watersheds Council and the laws at the state level that have allowed the ILLEGITIMATE uses of OWEB money for over 7 years (and GWEB money before that)."

In another email to Tom Byler dated July 17, 2007, you stated that you had not received all the records you had requested, particularly the documents that concerned you, stating: "Surely, you can understand the utmost importance of me having these documents ASAP both for my personal legal situation and for my efforts to help the community."

On July 17, 2007, Tom Byler advised you by email that you could pursue an appeal of OWEB's fee decision through the appeals process and noted that OWEB had furnished you with information on that process the previous week.

2. Analysis of Fee Waiver Decision

The Public Records Law confers a right to inspect any public records of a public body in Oregon, subject to certain exemptions and limitations. ORS 192.420. The law permits a public body to charge fees "reasonably calculated to reimburse it for its actual costs" in making the records available. ORS 192.440(3). "Actual costs" includes the time agency staff spends locating the records, searching its records for the requested material (even if it does not locate any requested records), supervising a requestor's inspection of the records to protect the records' integrity, copying, certifying, and mailing the requested records, and separating exempt from non-exempt material. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETING MANUAL (2005) (MANUAL) at 13-14; *see also* Public Records Order, May 17, 1999 (Smith); Public Records Order, May 10, 1996 (Kelly), Public Records Order, May 4, 1994 (Dixon); Public Records Order, May 19, 1993 (Smith); 39 Op Atty Gen 61, 68 (1978).

An agency may waive its fees for furnishing records pursuant to a public records request when it determines that it is in the public's interest to do so "because making the record available primarily benefits the general public." ORS 192.440(4). A person who believes that there has been an unreasonable denial of a fee waiver may petition the Attorney General for review of that denial. ORS 192.440(5). In reviewing an agency's denial of a fee waiver, we use a three-part analysis: a) whether a waiver is prohibited by law, b) whether the "public interest" test is met, and c) whether the agency's decision was "unreasonable." MANUAL at 16.

a. Waiver Prohibited by Oregon Law

Although ORS 192.440(4) allows a public body to waive its fees for furnishing public records when it determines that it is in the public's interest to do so, some public bodies cannot waive fees for making records available even if the provisions of ORS 192.440(4) are met. If a public body's sole funding for a particular program is from funds that are constitutionally, statutorily or otherwise legally dedicated, the public body in responding to a public records request may not charge fees that are lower than its actual costs. To do so would be an illegal diversion of those dedicated funds. 39 Op Atty Gen 61 (1978); MANUAL at 16. More recently, we confirmed that constitutionally dedicated funds may be used for administrative costs only when those costs are incurred to support an allowable expense of the dedicated fund. 49 Op Atty Gen 230, 232-233 (2000) (slip op at 3). *See also* Suo/Mayes PRO (March 10, 2000) (waiver or reduction of public records costs cannot be effectuated by ODOT using constitutionally or statutorily dedicated state highway funds).

As noted above, the main reason OWEB gave for denying a fee waiver in response to your public records request is that its funding comes from dedicated funding, and providing records at less than actual cost would be an illegal diversion of those funds.

OWEB's primary source of funding is constitutionally dedicated lottery revenues. Article XV, Section 4b, of the Oregon Constitution, provides:

> **Section 4b. Use of net proceeds from state lottery for salmon restoration and watershed and wildlife habitat protection.** Moneys disbursed for the public purpose of financing the restoration and protection of wild salmonid populations, watersheds, fish and wildlife habitats and water quality from the fund established under Section 4 of this Article shall be administered by one state agency. At least 65% of the moneys will be used for capital expenditures. These moneys, including grants, shall be used for all of the following purposes:
>
> (1) Watershed, fish and wildlife, and riparian and other native species, habitat conservation activities, including but not limited to planning, coordination, assessment, implementation, restoration, inventory, information management and monitoring activities.
>
> (2) Watershed and riparian education efforts.
>
> (3) The development and implementation of watershed and water quality enhancement plans.
>
> (4) Entering into agreements to obtain from willing owners determinate interests in lands and waters that protect watershed resources, including but not limited to fee simple interests in land, leases of land or conservation easements.
>
> (5) Enforcement of fish and wildlife and habitat protection laws and regulations.
>
> [Created through initiative petition filed March 11, 1998, and adopted by the people Nov. 3, 1998]

OWEB is the "one state agency" authorized to administer those funds. *See, generally*, ORS 541.351 to 541.415. OWEB receives no general fund revenue from the State of Oregon. Approximately 93% of OWEB's total funding is derived from the revenue constitutionally dedicated under Article XV, Section 4b. Another nearly 7% of OWEB's total funding is in the form of revenues from the National Marine Fisheries Service (NMFS), as part of the Pacific Coast Salmon Recovery Fund (PCSRF). Pursuant to a Memorandum of Agreement (MOA) between OWEB and NMFS, PCSRF funds must be allocated by OWEB "to further the goal of protecting and restoring anadromous salmon and steelhead species subject to provisions of the federal Endangered Species Act." 97% of PCSRF funds go toward projects to achieve that goal. Under the MOA, no more than three percent of PCSRF funds may be used for OWEB's administrative expenses. For the 2007-2009 biennium, the amount of OWEB's funding allocated to administrative expenses under the MOA is approximately .3% of OWEB's total revenues.

In addition, a portion of the surcharge revenue of $7.50 per license plate generated from DMV's sale of Oregon salmon license plates is directed to OWEB. ORS 804.255. The salmon license plate revenue that OWEB receives is statutorily restricted to be used "for watershed enhancement projects under ORS 541.375 that are designed to restore salmonid habitats and improve the health of streams that support salmonid populations." ORS 804.256. Those purposes do not include responding to public records requests.

Hence, 99.97% of OWEB's total funding is dedicated either by the Oregon Constitution, by Oregon statute or by intergovernmental agreement with the federal government, to watershed protection and salmon recovery purposes, and therefore virtually none of OWEB's funding is available to use to reduce or waive the costs associated with responding to public records

requests. Although the Public Records Law permits an agency to waive its costs for making records available, that statute cannot override the constitutional and statutory limitations on the use of funds. We therefore conclude that OWEB cannot waive its actual costs in providing the requested records to you if those costs would otherwise be paid from funds dedicated to watershed protection under Article XV, Section 4b, of the Oregon Constitution, federal funding allocated by intergovernmental agreement to salmon recovery efforts, or license plate revenues statutorily dedicated to salmon recovery projects.

b. The "Public Interest" Test

For purposes of this order, we have assumed without deciding that the fraction of OWEB's funding that is not restricted as described above could lawfully be applied to the costs of responding to your requests. With that assumption as the predicate, we consider whether waiver of the fees associated with your public records request is compelled by the public interest. For the reasons described below, we conclude that it is not.

The Public Records Law permits state agencies to waive fees, as a matter of discretion, if a waiver is in the public interest, that is, if making the records available primarily benefits the general public. Factors to consider in whether the public interest test is met include the requestor's identity, the purpose for which the information will be used, the nature of the information, whether the information is already in the public domain, and whether the requestor can demonstrate the ability to disseminate the information to the public. The requestor's ability to pay is also a factor but alone is not sufficient to deny a fee waiver. MANUAL at 18.

Many of your requests have focused on documents concerning yourself. In your email dated July 17, 2007, for example, you stated that your request for records was in part "for my personal legal situation." You did not elaborate on that stated purpose, and we decline to speculate about it. Taken at face value that particular statement evidences a personal interest instead of a public interest.

You question whether an ongoing investigation into watershed council issues[3] can be "fairly" completed without your review of numerous documents. While we agree that it is in the public interest for the investigation to be complete and that it be "fairly" conducted, we do not understand how waiving fees and costs associated with your request would serve that interest. You are not the investigator. OWEB is conducting the investigation, and it already has access to all of the materials that you have requested. To the extent that your review might serve the public interest by challenging the agency's understanding or interpretation of a record, the agency has suggested a procedure through which you can review the requested records and

[3] At the May 15-16, 2007 OWEB Board meeting, Ms. Ashy testified during the two public comment periods about the MidCoast Watersheds Council. In her testimony, Ms. Ashy made a number of allegations associated with the MidCoast Watersheds Council and its watershed council support grant application. The OWEB Board indicated that it would look into the issues raised in her testimony and tasked the Executive Director with conducting an investigation. In that investigation, which is pending, OWEB staff have focused the investigation on the allegations pertinent to OWEB's interests.

formulate such challenges. We are not persuaded that waiving fees involved in providing such records during the investigation is compelled by the public's interest.

c. Reasonableness of Decision to Deny Fee Waiver

Again assuming without deciding that the fraction of OWEB's funding that is not restricted as described above could lawfully be applied to the costs of responding to your requests, ORS 192.440(5) requires us to consider whether OWEB's denial of a fee waiver was reasonable under the circumstances.

As noted above, the standard for reviewing a public agency's denial of a fee waiver is whether the denial is unreasonable. The decision to waive is permissive, not mandatory. Public Records Order, December 12, 1995 (Pecknold) ("The legislative history demonstrates an intent to place a great deal of discretion in the custodian of the records."); Public Records Order, May 19, 1993 (Smith) (analyzing legislative history). We look to the following factors in determining whether an agency's denial of a fee waiver is unreasonable: the 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 for the particular needs of the requestor. MANUAL at 19.

As noted above, your public records request consists of an extended series of email requests, many of which have added new requests to previous requests for public records. After providing many of the documents, OWEB advised you that your further requests were burdensome and would require a great deal of staff time and effort to produce. OWEB attempted to reduce the actual costs of producing the records by suggesting reasonable alternatives, including the opportunity for you to review the records herself and to copy only those pages that you specifically request. You declined OWEB's invitation.

OWEB estimated its actual costs in complying with this request at $900 in staff time. OWEB considers the sum of $900 significant in comparison to its unrestricted resources. In the context of an agency whose expenditures are restricted to specified purposes, we conclude that the agency reasonably concluded that absorbing the costs of complying with your requests would impose financial hardship on OWEB .

OWEB also asserts that waiving fees would interfere with the business of OWEB. Your requests do not encompass a fixed set of records as to which the agency can reliably determine the amount of costs you ask it to absorb. Instead, your requests have overlapped and expanded weekly. OWEB estimates that the cumulative new requests would require searching through over 200 files to identify documents responsive to the request. Further, some of the documents may be attorney-client privileged and would require review for segregation of exempt materials. Under these circumstances, OWEB reasonably has concluded that the burden of complying with continuously evolving requests, without recovering the costs of such compliance, will interfere with its business operations.

In light of the financial hardship to OWEB, the extent of time and expense to OWEB, the volume of the requested records, the necessity to segregate exempt and nonexempt materials, and OWEB's offers to make arrangements to minimize its cost of responding to the requests, we conclude that OWEB's decision not to grant a fee waiver is not unreasonable. We therefore respectfully deny your petition.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

AGS20116
c: Tom Byler, OWEB Executive Director