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September 5, 2006

William T. Harbaugh
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Re: Petition for Review of Denial of Fee Waiver
University of Oregon Records

Dear Professor Harbaugh:

This letter is the Attorney General's order on your petition for review of the University of Oregon's decision to deny your request for a waiver of fees under the Public Records Law, ORS 192.410 to 192.505. We received your petition on August 24, 2006.[1] According to your petition, you asked Ms. Grier on July 20, to waive fees associated with your request for copies of several affirmative action plans and lists of "tenure track hires for the years 1994 – present."[2] You have clarified that your request for the list of hires is actually a request for a list of tenure-related hires since 1994, with their name, department, rank when hired, and current department. 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 the records available. ORS 192.440(3). A public body may require pre-payment of estimated fees before acting on a request. ATTORNEY GENERAL'S PUBLIC RECORDS AND PUBLIC MEETINGS MANUAL (2005) at 13. ORS 192.440(4) authorizes a public body to

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[1] You originally emailed your petition to Assistant Attorney General Christine Chute, with a copy to University of Oregon General Counsel Melinda Grier and one other person, on August 23, 2006. AAG Chute forwarded the petition to the Attorney General's office, where it was received on August 24, 2006. Accordingly, we treat your petition as having been filed on August 24. *See* ORS 192.450(1) (public records order must issue within seven days from the day "the Attorney General receives the petition"). You agreed to extend the time to respond until September 5, 2006. We appreciate your willingness to permit this additional time.

[2] You also asserted that Ms. Grier had not responded to your request for a waiver of fees and asked us to interpret the lack of response as a denial. Because Ms. Grier has now responded in writing, we need not address this point. *See* Letter dated August 30, 2006, from Grier to Harbaugh.

waive fees if it determines that waiving fees is in the public interest "because making the record available primarily benefits the general public." However, even if a public body determines that waiving fees is in the public interest, "the decision to waive or reduce fees is discretionary with the public body, although it must act reasonably." AG'S MANUAL at 18-19. Under ORS 192.440(5), 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[.]"

With these principles in mind, we address each part of your waiver request separately, beginning with the affirmative action plans.

1. Request for Affirmative Action Plans.

According to information that you supplied, the University has estimated $150 as the cost of preparing the Affirmative Action Plan (AAP) documents that you requested, plus $.25 per page for any copies that you requested. The $150 would reimburse the University for 2.5 hours of staff time to review the records and redact personally identifiable information. The University would charge less if the work takes less time or more if the work takes more time. You agree to pay for the copying costs, but not for other costs associated with making the documents available. You rely upon a statement in the 1994 Affirmative Action Plan that the plan should be made freely available to University employees and upon OAR 166-475-0095(3), the document retention rule that applies to affirmative action and equal opportunity records for the Oregon University System.

The Attorney General has no authority to determine whether the amount of the original estimate is reasonable. AG'S MANUAL at 15, n 48. The Attorney General does, however, have authority to determine whether the refusal to waive or reduce fees is reasonable. *Id.* A public body may, but is not required to, waive fees if the public body determines that making the record available "primarily benefits the general public." ORS 192.440(4). The public interest test is satisfied if furnishing the record "has utility – indeed, its greatest utility – to the community or society as a whole." *In Defense of Animals v. OHSU*, 199 Or App 160, 189, 112 P3d 336 (2005).

You have identified the AAPs as relevant to an evaluation of the legality of the University's Under-represented Minority Recruitment Fund (UMRF). In determining whether a public records request serves a sufficient public interest, our office has considered "the requestor's identity, the purpose for which the requestor intends to use the information, the character of the information, whether the requested information is already in the public domain, and whether the requestor can demonstrate the ability to disseminate the information to the public." AG'S MANUAL at 18.

Applying these factors, we conclude that making the AAPs available will primarily benefit the public. You are a professor of Economics at the University and seek copies of the AAPs to evaluate the legality of the UMRF. While we do not express an opinion on whether access to the AAPs will actually contribute to a meaningful evaluation of the UMRF, the University has stated its policy of making the AAPs widely available. Your history of

publication leads us to conclude that you have some ability to provide the information to the public. *Id.*

Having concluded that making the records available is in the public interest, we examine whether the University's decision to deny the fee waiver is reasonable. AG'S MANUAL at 19. If the University's decision was reasonable, the Attorney General cannot overturn the decision, even if a different agency might have reached a different result.[3] Reasonableness is an objective standard that requires an examination of the "totality of the circumstances presented." *In Defense of Animals*, 199 Or App at 190. We have identified several factors to consider in evaluating the reasonableness of a denial, including:

> 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 nonexempt materials, and the extent to which an inspection of the records is insufficient for the public interest or for the particular needs of the requestor.

AG'S MANUAL at 19.

a. Financial Hardship.

Waiving the estimated fee of $150 would not itself create a financial hardship for the University.

b. Time, Expense and Interference with University Business.

The University has expended a significant amount of time and resources attempting to respond to your requests for public records. The University considered this factor in denying your request for waiver and this factor tends to support the reasonableness of the University's decision.

You requested AAPs for the years between 1992 and 2004. The University initially provided a copy of the 2004 AAP to you at no charge. (Email, from Harbaugh to Chute, August 27, 2006). After a search, the University also located AAPs for 1991-92, 1994, 1995, 1996, and 2003, totaling 2,349 pages. (Email, from Grier to Harbaugh, July 5, 2006). You asked the University to continue searching for AAPs for the period between 1996 and 2003, and you sought a public records order requiring the University to disclose those records.[4]

In response to your requests, the University reviewed files in the Affirmative Action Office, the General Counsel's Office, the President's Office, and in the University Archives before concluding that the plans either were never prepared or were lost.[5] While the University is entitled to charge for time spent locating records, the University has already waived the cost of

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3 Public Records Order, March 27, 2002, Zaitz.

4 Public Records Order, August 8, 2006, Harbaugh.

5 Public Records Order, August 8, 2006, Harbaugh.

its search for the AAPs you requested. AG'S MANUAL at 13; ORS 192.440(3)(a) (public body may charge actual cost of compiling public records in response to request).

Additionally, you asked several other persons at the University to locate AAPs and related information, including requests to Shirley Stahl, Joan Walker, Lorraine Davis, Penny Daugherty, Melinda Grier, and the office of President Frohnmayer. University General Counsel Grier and Ms. Daugherty have both met with you in response to your requests for records. A significant amount of time and resources have been spent to respond to your requests.

c. Volume of Records.

The records you requested total over 2300 pages, which we find to be a substantial amount. Again, the University considered this factor in evaluating your request for a fee waiver and this factor tends to support the reasonableness of the University's decision.

d. Segregation of Exempt Records

The major cost included in the estimate relates to time for staff to redact exempt personally identifiable information from the AAPs. This factor tends to support the reasonableness of the University's decision.

e. Inspection Insufficient for the Public Interest

You have not asked the University to waive the cost of copying records, as opposed to inspecting them. Therefore, we conclude that this factor is not relevant to your petition for a public records order.

f. Amount of Other Costs Waived

We have concluded in other cases that fee reductions of approximately 25% are not unreasonable. AG'S MANUAL at 19. The University already has waived the cost of staff time to search for the AAPs and the cost of the 2004 AAP. These circumstances support the reasonableness of the University's determination not to waive the remaining $150 in costs.

Based upon our evaluation of these factors, we cannot say that the University's denial of your fee-waiver request was unreasonable under all the circumstances under which it was made. We do not consider the statement contained in the 1994 AAP or OAR 166-475-0095(3) because the Attorney General has no authority to use the Public Records Law as a vehicle to enforce either University policy or records retention laws.

2. List of tenure-related hires.

We now turn our attention to your request for a list of tenure-related hires and related information. The University has estimated it will cost $915.60 to prepare the list of tenure-

related hires since 1994 and related information.[6] According to Ms. Grier, no document currently exists that contains the precise information that you requested. Therefore, the University must create a record by developing a query of the University's electronic database. The cost estimate covers the cost of time for one person who works with the University's data base to write and execute a query or queries sufficient to obtain the information you request. The person who would be charged with writing the query made the estimate and estimates that it would take three days of her work time. According to Ms. Grier, if the work takes more time, the cost would rise from the original estimate; if the work takes less time, the cost would drop.

The Public Records Law does not require a public body to create new records. We do, however, think that the Public Records Law imposes a duty on public bodies to "retrieve and make available nonexempt computer or electronically stored data and information, when requested, through the computer software or programs in use by the public body." AG's MANUAL at 6. A public body need not create or acquire additional software or programming to retrieve data in response to a public records request.

In this case, the design and creation of a query to obtain the information you have requested essentially requires an information services employee of the University to develop a new report. The work involved is more significant than simply copying an existing report or record, and is more akin to creating additional programming than to simply running an existing program. The University is not required to do this in response to a public records request and we cannot order the University to do so. Because we cannot order the University to create this record, we cannot order it to waive the cost associated with creating it.

Sincerely,

PETER D. SHEPHERD
Deputy Attorney General

c: Melinda Greer, University of Oregon

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[6] This amount accounts for 24 hours of Sherry Stahl's time at $38.15 per hour. (Email from Grier to Harbaugh, July 20, 2006).