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April 23, 2015

Chuck Erickson, Director / CDAO
PO Box 1083
Coos Bay OR 97420

Re: Petition for Public Records Disclosure Order
Oregon State Marine Board
DOJ File No. 25001-GA0078-15

Dear Mr. Erickson,

This letter is the Attorney General's order in response to your petition asking our office to order the Oregon State Marine Board (OSMB) to waive fees associated with a request you made on behalf of the Clam Diggers Association of Oregon (CDAO) seeking records from OSMB. Specifically, you sought eight items from OSMB:

1. Contracts with the Coos County law enforcement programs for marine patrol services.
2. Coos County hours of reported marine work.
3. OSMB inspect vessels and check hour meters for Coos County.
4. Coos County statistics maintained by OSMB as it relates to their area of operation and the agreement with OSMB.
5. Coos County documents related to vessel maintenance and approval documents for all repairs OSMB were asked to fund.
6. Coos County reporting for marine patrol hours.
7. Coos County reported boat exams, cites, warns and other reported activities.
8. Information on OSMB upcoming program review and contract renewal.

OSMB established a fee for responding to this request in the amount of $63.75. You asked that the fee be waived, and OSMB declined. Your petition asking us to order the fee to be waived followed. For the reasons given below, it is respectfully denied.

The Oregon Public Records Law, ORS 192.410 to 192.505, provides that "Every person has a right to inspect any public record of a public body in this state, except as otherwise

expressly provided by ORS 192.501 to 192.505." ORS 192.420(1). In making public records available, public bodies are authorized to establish fees "reasonably calculated to reimburse the public body for the public body's actual cost of making public records available." ORS 192.440(4)(a). A public body may waive or significantly reduce its fees "if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public." ORS 192.440(5). Pursuant to ORS 192.450(5), "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 under ORS 192.410 to 192.505." Your petition therefore presents two questions: first, whether "making the record[s] available [to you] primarily benefits the general public" and second, if it does, whether OSMB's denial of your fee waiver request was "an unreasonable denial."

In requesting a waiver of fees from OSMB, you offered an explanation of the reasons for the request:

> The poor condition of Coos County docks must be addressed. The overcrowding at launch facilities needs to be addressed. The only way this can be accomplished is through a review of current and past funding programs.

OSMB's denial of your fee waiver request noted that your request did not seem to be seeking documentation that would meaningfully illuminate such issues:

> There is no correlation between the condition of launch facilities and the documentation requested. The condition of the docks should be addressed directly with Coos County of the Port of Coos Bay.

In your petition you offer a different explanation why the public interest would be served by disclosure of the requested information:

> The requested information is needed so the CDAO can examine the funding the OSMB gives to Coos County for boat launch and Marine Deputy.
>
> CDAO wants to verify how these monies were to be spent. We are getting complaints about docks not being properly maintained. We also are getting feedback that no one sees the Marine Deputy, nor have we found anyone who has received a boat inspection sticker.

We agree that this revised explanation articulates a sufficient public interest that OSMB would be statutorily authorized to reduce or waive the fees associated with your request. That explanation was not available to OSMB when it made its decision, however.

Moreover, the conclusion that disclosure would serve the public interest does not mean that OSMB was necessarily required to waive its fee. According to the Court of Appeals:

> [E]ven if the public body determines that the requestor meets [the public interest] test, 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, 199 Or App at 189. In exercising that discretion, "the public body's decision whether to grant or deny a fee waiver or reduction must be reasonable." *Id.*

To determine whether OSMB's decision with respect to the waiver request was reasonable, we must "examine the totality of the circumstances presented." *Id.* at 189-190. A public body's decision must be upheld if it is objectively "reasonable" under all of the circumstances presented.

Notwithstanding the directive to consider all of the relevant circumstances, *In Defense of Animals* does not explain how various circumstances should be weighed as part of an overall assessment of reasonableness. The court does observe that "the Public Records Law as a whole embodies a strong policy in favor of the public's right to inspect public records." 199 Or App at 189-190. And the court notes that "the public body's discretion must be exercised within the range of lawful options available to it under the relevant law." *Id.* at 189. Consequently, the appropriate inquiry appears to be whether the public body's decision impedes the policies favoring disclosure of public records to the extent that the decision cannot be said to reflect a "lawful option[]" under the Public Records Law. In general, we think that a public body's fee-waiver decision should consider (1) the character of the public interest in the particular disclosure; (2) the extent to which the fee impedes that public interest; and (3) the extent to which a waiver would burden the agency. We review the totality of the circumstances to determine whether the agency's decision exceeds the lawful options available to it under the Public Records Law. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2014) at 22-23.

The fee established by OSMB does not seem to us a significant impediment to disclosure. Moreover, OSMB informs us that the fee already reflects a discount from OSMB's actual costs, as it is based on the hourly rate of administrative staff while in fact fulfilling your request will require higher-level staff to compile information. Though we acknowledge some public interest would be served by disclosure of this information to CDAO, we cannot conclude that OSMB's decision was unreasonable under the circumstances. As a consequence, we respectfully deny your petition.

Sincerely,

FREDERICK M. BOSS
Deputy Attorney General

cc via email only:
Scott Brewen, OSMB