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November 5, 2010

Christian Wihtol, Senior Editor
The Register-Guard
3500 Chad Drive
Eugene, OR 97408

Re: Petition for Review of Denial of Fee Waiver:
*University of Oregon Documents*

Dear Mr. Wihtol:

On October 22, 2010, we received your petition asking the Attorney General to determine that the University of Oregon (UO) did not respond reasonably to your fee waiver request. ORS 192.440(6). You agreed to extend our statutory deadline for responding to your petition until November 5, 2010, and we thank you for that courtesy. For the reasons that follow, we respectfully deny your petition.

**Background**

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 authorizes public bodies to "establish fees reasonably calculated to reimburse the public body for a public body's actual cost of making public records available." ORS 192.440(4)(a). The law also authorizes public bodies to waive or reduce fees under certain circumstances:

> The custodian of any public record may furnish copies without charge or at a substantially reduced fee 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).

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." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2010) ("MANUAL") § I.D.6.b.(2)(c), http://www.doj.state.or.us/public_records/ manual/public_records.shtml#d, citing

*In Defense of Animals v. Oregon Health Sciences University*, 199 Or App 160, 189-90, 112 P3d 336 (2005). Under ORS 192.440(6), "[a] person who believes that there has been an unreasonable denial of a fee waiver or fee reduction may petition the Attorney General * * * in the same manner as a person petitions when inspection of a public record is denied * * *."

You initially requested records from UO in the summer of 2009. Specifically, you requested all records received or generated since March 1, 2010, by the Oregon Bach Festival executive director, John Evans, regarding a possible replacement for the festival's Artistic Director (AD), Helmuth Rilling. UO responded that it had the records and stated that the cost to Register-Guard would be $1,008.54. On September 19, 2010, you emailed UO's Public Records Office and requested a fee waiver or reduction. You also renewed those requests on September 27 and October 10, 2010. On October 15, 2010, UO offered a 20% reduction in total fees from $1,008.54 to $806.63.[1] You requested an explanation from UO as to how it arrived at the 20% reduction, to which UO responded, "The Public Records Office conducted the balancing test process in good faith and provided the Register Guard with a 20% discount." You then petitioned our office on October 22, 2010, arguing that UO's 20% reduction was unreasonable.

**Analysis**

First, your petition argues that UO was required to provide an explanation of how it conducted the balancing test directly to the Register Guard. We find no support for that contention, statutory or otherwise. We note that while ORS 192.440(5) requires a custodian of records to consider whether a reduction of fees is in the public interest, and *In Defense of Animals* requires that a denial of a fee waiver or reduction must be "reasonable," 199 Or App at 190, it is not required that the custodian provide such an explanation to the requestor directly. UO has tendered its analysis to this office, as detailed below, and we conclude that is sufficient.

We note that there are reasons why a public body may wish to provide such an explanation. An explanation increases transparency and may decrease the likelihood of appeal by demonstrating the reasons why the public body believes its decision is reasonable. It may also save the trouble of having to separately explain the decision if the requester seeks review of the decision. On the other hand, an agency may conclude that the cost of routinely preparing such an explanation outweighs the potential benefit, and we see nothing in the law that would preclude such a decision.

Second, your petition argues that UO's 20% reduction is unreasonable. As noted, ORS 192.440(5) provides that a record custodian "may furnish copies without charge or at a substantially reduced fee 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." Accordingly, the threshold question here is whether the waiver or reduction of fees "is in the public interest because making the record available primarily benefits the general public." We note that the Register-Guard argued that the public interest was "considerable" for reasons we summarize as follows:

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[1] UO noted that the $806.83 was an estimate, but confirmed that the actual final cost of producing the records would be reduced by 20%.

- The replacement of Helmuth Rilling as AD "may have" ramifications for the local economy and local jobs.

- Because the AD shapes the musical and cultural values of the festival, the choice of a replacement has "ramifications for the enjoyment of thousands of people."

- The many local individuals who have contributed to the festival have a "financial investment in the future of the enterprise" and the AD's role in its future.

- Because the Bach Festival executive director has stated that he favors "transparency" in the replacement process, newspaper coverage of the process would provide that transparency.

Liz Denecke, UO Records Custodian, states that UO regards the public's interest in disclosing information about the ongoing search process as "marginal." UO believes that, if the search process is highly publicized, qualified persons under consideration may withdraw to avoid unwanted exposure of that fact. Consequently, UO believes that disclosure would put it at risk of losing the interest of talented artists who might otherwise be considered to fill the role of Bach Festival AD. We find these concerns about disclosure during the search process to be plausible. *See, e.g.*, Letter of Advice to W.T. Lemman, Chancellor, Oregon State System of Higher Education (OP-6248), October 13, 1988 (noting that disclosing identities of candidates for office of president could disserve the public interest by discouraging qualified candidates from applying).

Notwithstanding the court's directive to consider all of the relevant circumstances, *In Defense of Animals* does 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 or the public's right to inspect public records." 199 Or App at 189-90. 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. Thus, 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 believe 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.[2] MANUAL § I.D.6.b.(2)(c).

Thus, we begin by examining the character of the public interest in this particular disclosure. In balancing the considerations, we conclude that, while there is a public interest in the disclosure you have requested, it is not particularly great. The interests of individual private donors to the festival are not necessarily interests of the public at large. *See In Defense of Animals*, 199 Or App at 188 ("A matter or action is commonly understood to be 'in the public

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[2] This non-exhaustive list is not intended to foreclose other considerations that may be appropriate in any given case.

interest' when it affects the community or society as a whole, in contrast to a concern or interest of a private individual or entity."). Moreover, UO's concerns highlight ways in which many of the interests you identify could actually be harmed by disclosure. If disclosing details about this process will drive away talented candidates, the result could be detrimental to the fiscal and aesthetic interests you identify.

Next, we determine that UO's fee for the records does not unduly obstruct those public interests that are served by disclosure. In certain instances, a fee of $806.83 could present an effective bar to disclosure. However, the Register Guard is Oregon's second-largest newspaper and has a large circulation. Although the discounted fee undoubtedly requires the Register Guard to think about whether paying for a portion of the costs of this request is a worthwhile expenditure of its funds, we doubt that the Register Guard is ultimately unable to pay the fee. This context is relevant is assessing the degree to which the fee impedes disclosure. *See, e.g.*, Public Records Order, September 10, 2009, Rogers (fee of $466.50 was not a significant impediment where requester had threatened litigation, which would entail incurring substantially greater expenses); Public Records Order, June 8, 2010, Zaitz and Sinks (noting that the Oregonian apparently had the ability and the incentive to pay a fee of $788.50).

Finally, we examine the extent to which a waiver would burden UO. Factors pertinent to determining whether UO's exercise of discretion was reasonable include

> 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 materials 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 requester.

MANUAL § I.D.6.b.(2)(c).

In response to your petition, Ms. Denecke relates that the request involves a large volume of materials, that it presents issues regarding segregation of exempt and non-exempt materials, and issues regarding the redaction of materials involved in the request. Ms. Denecke also relates that it would require a substantial amount of staff time to address these issues.

Overall, we conclude that the impediment to disclosure posed by the discounted fee is not unreasonable in light of the character of the public interest in the particular disclosure and the extent to which waiver would burden UO. As a result, we respectfully deny your petition.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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c: Liz Denecke, Records Custodian, UO