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August 6, 2010

James L. Weems
933 Empire Drive
Pasco WA 99301

Re: Petition for Review of Denial of Fee Waiver:
Oregon University System
DOJ File No. 580-800-GA0097-00

Dear Mr. Weems:

This letter is the Attorney General's order on your petition for review of the denial by the Oregon University System (OUS) of your request for a waiver of fees under the Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on July15, 2010, states that "an unreasonable demand for money was made with the proviso that the actual cost could be significantly more." You had asked OUS to provide you with copies of, or access to, records of the Chancellors Office and Eastern Oregon State College (EOSC), now Eastern Oregon University (EOU) regarding a 1978 claim of financial exigency at EOSC by then-President Rodney Biggs.

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 records available. ORS 192.440(4). A public body may require pre-payment of estimated fees before acting on a request. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) (MANUAL) at 15. ORS 192.440(5) authorizes a public body to waive fees if it determines that the waiver 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." MANUAL at 20. 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.

We reviewed the correspondence between you and Ryan James Hagemann, Secretary to the State Board of Higher Education. Mr. Hagemann estimated that the costs of providing the public records you requested would be $2,411.00. You subsequently requested a waiver of the fee, asserting that the nature of the records you requested justified a fee waiver. Mr. Hagemann agreed to reduce the fee by 25%, to $1,808.25, but declined to waive it entirely. After some back and forth, you asked that Mr. Hagemann allow you to inspect whatever records were immediately available:

> * * * I am requesting that you make available to me for inspection those records detailed in my original December 10, 2008 letter and again in my June 29, 2009 letter. This request would be in lieu of copying and delivering the information to me as previously demanded, and shall be taken to mean that I am interested in inspecting any documents or records that are immediately available and, for now, not those documents or records which are apparently not where they logically should be and will instead require hours to locate.

Neither OUS nor EOU has any immediately accessible documents responsive to your request, however. In fact, neither OUS nor EOU is certain that it has any responsive records whatsoever.

You now ask us to order OUS to waive or further reduce its fees.

As we noted above, the Public Records Law authorizes public bodies to waive or reduce their 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).

In reviewing fee waiver decisions, a threshold question is whether "the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public" as required by ORS 192.440(5). OUS's decision to waive a portion of its fee implies a conclusion that disclosure to you would primarily serve the general public, and neither you nor OUS has argued the contrary to our office.

By itself, however, that conclusion does not mean that OUS was required to do any more than it did. 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 v. Oregon Health Sciences University, 199 Or App 160, 189 (2005). 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 OUS'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.

We believe that the appropriate inquiry is 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.[1] 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.

With respect to the character of the public interest in disclosure, you report that the American Association of University Professors (AAUP) conducted an investigation into President Briggs' claim of financial exigency between 1979 and 1982, and "[b]asically, the AAUP found that there had been no financial exigency at EOSC." You further state that "The investigation [by AAUP] resulted in EOSC being placed on the AAUP censured list until 1989." You cite an article published in *Academe* in 1982, relating the investigation and finding.

If these events were current, we would very likely find a significant public interest served by disclosure. And, if the events were current, the cost to OUS of responding to your request would likely be significantly less. But the reality is that the claim of exigency was made 32 years ago. We are unaware that any other person has expressed any recent interest in this matter; as noted above, even the article that sparked your present interest was published more than a quarter of a century ago. In fact, it is not even certain that records responsive to your request exist in OUS custody after this extended passage of time. For your part, you acknowledge that you are personally interested in the events of 1978; your tenured faculty position was one of three positions eliminated on the basis of the declaration of financial exigency. You brought related litigation that reached the Oregon Court of Appeals. And, as you point out, the matter was independently investigated by AAUP and an article published about the events in *Academe*. In short, the underlying events have been investigated and litigated, and information about the events is already available to members of the public who happen to be interested. Overall, we must conclude that those factors, combined with the passage of time, significantly diminish the strength of the public interest in disclosure. Your interest is not indicative of a widespread interest, and we have difficulty envisioning any likely societal benefit arising from disclosure at this late date. Instead, your interest appears to have been sparked by personal considerations.

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[1] Of course, we do not foreclose the possibility that other considerations may be appropriate in any given case.

The quoted fee amount, even with a 25% reduction, constitutes a significant impediment to the disclosure of these records, if any records still exist. But we do not think that this impediment to disclosure is unreasonable.

As a result, we cannot conclude that Mr. Hagemann acted unreasonably in refusing to waive more than 25% of the fee associated with your request. Though the fee remains high, the existence of records is somewhat uncertain, and the current public interest in this matter does not appear to be all that significant. We see no reason to distinguish this case from several other instances in which we have concluded 25% fee reductions were not unreasonable. MANUAL at 21.

Mr. Hagemann informs us that the estimated cost of responding could likely be significantly reduced by narrowing your request for documents. Mr. Hagemann notes that you request "*any* relevant information concerning the 1978 claim of financial exigency made by EOSC * * *" (emphasis in original). You then provide an illustrative list of types of documents that would fall within your request, in which you make it clear that the time frame for the requested records would extend to 1989. Mr. Hagemann points out that, by its terms, this is a very broad request for records that would not be satisfied by (for example) looking to determine whether OUS and EOU maintain files dedicated to the claim of exigency. Instead, OUS and EOU would need to review any files that might contain documents relevant to that claim of exigency to identify any such documents. This understanding of your request appears to comport with the language of your request. Mr. Hagemann believes that the cost of responding could be reduced, potentially by a significant amount, if you focus your request more narrowly. Mr. Hagemann also indicates that OUS is willing to consider any ideas you might have about facilitating your access to these records while minimizing the burden on OUS – and thus minimizing the cost to you.

For the reasons explained above, we respectfully deny your petition asking us to order OUS to waive or further reduce its fees. We are hopeful that you and OUS may be able to reach some mutually agreeable resolution that facilitates your access to the records you seek. Although we recognize that may not be possible, we cannot conclude that OUS's insistence that you pay 75% of its estimated fee is unreasonable under the circumstances.

Sincerely,

DAVID E. LEITH
Associate Attorney General

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c: Ryan Hagemann, OUS