JOHN R. KROGER
ATTORNEY GENERAL

MARY H. WILLIAMS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

1162 Court Street NE
Justice Building
Salem, Oregon 97301-4096
Telephone: (503) 378-4400

June 8, 2010

Les Zaitz, Senior Investigative Reporter
The Oregonian
1320 SW Broadway
Portland, OR 97201-3499

James Sinks, Communications Director
Oregon State Treasurer's Office
159 State Capitol
900 Court Street NE
Salem, OR 97301-4043

Re: Petition for Public Records Disclosure Order:
Oregon State Treasurer, Investment Division Records

Dear Mr. Zaitz and Mr. Sinks:

On May 23, 2010, we received Mr. Zaitz's petition seeking an order directing the Investment Division of the Oregon State Treasurer (OST) to provide him with certain records. Specifically, Mr. Zaitz is seeking 23 scheduling documents pertaining to meetings of private equity investment partnerships attended by OST employees. For the reasons that follow, we grant Mr. Zaitz's petition in part, and respectfully deny it in part.

Background

Mr. Zaitz requested the documents in question on April 7, 2010. In response to that request, OST Contracts & Corporate Governance Officer Jen Peet sent Mr. Zaitz an invoice estimating the cost of fulfilling the request at $788.50. Ms. Peet's cover letter indicates that this cost reflects 20 minutes of OST investment officer time for each schedule, "to seek the consent of each manager [of a privately-placed fund] to release these records." Ms. Peet's cover letter also states that the requested records "may fall under the statutory exemptions to the public records law, particularly in instances where the records mention specific investments or related sensitive issues." OST Communications Director James Sinks also corresponded with Mr. Zaitz concerning his request. Among other things, Mr. Sinks told Mr. Zaitz in an email dated May 20 that "the Treasury has not at any time denied [the] request for these sought agendas, which the Treasury believes to be exempt from disclosure under the Public Records Law *in whole or in part*" (emphasis added). On May 21, Mr. Sinks stated that "The request * * * is in limbo and awaiting payment."

In his petition, Mr. Zaitz asks that our office "find that these records are not exempt from disclosure and order their immediate release." He also asks that we "find that [OST]'s claim that it can't release these records without third-party authority is a de facto denial of [his request], * * * find the agency's claim is without merit, and * * * order the records released." In the alternative, Mr. Zaitz asks that we order OST to waive its estimated fee, "finding their disclosure serves the public interest." Mr. Zaitz's petition describes the response from OST as being, effectively, "[t]o say 'we're not denying you but the records are exempt.'" Mr. Zaitz characterizes this as "an inartful way [of] placing the request in an impermissible limbo."

We respectfully disagree with Mr. Zaitz's characterization. OST has never stated that the records are wholly exempt. To the contrary, Ms. Peet indicated that the records "may" be exempt, "particularly where" certain conditions are present. Mr. Sinks stated that OST "believes" the records are exempt "in whole *or in part*." Without stating that the records are wholly exempt from disclosure, the consistent message from both Ms. Peet and Mr. Sinks has been that fee payment is required. Public bodies may require prepayment of their fees for public records. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) (MANUAL) at 15. Permissible components of a fee include "a charge for time spent by [OST] in locating the requested records [and] reviewing the records in order to delete exempt material." *Id.* A fee can also include "the cost of time spent by the public body's attorney reviewing, redacting and segregating records." *Id.* Moreover, "[p]ublic bodies may charge for search time even if * * * the records located are subsequently determined to be exempt from disclosure." *Id.* at 16. In short, OST can charge a fee that includes the cost of many steps that are necessary to determine ***whether*** records are exempt from disclosure.[1] In light of those principles, the fact that OST has affirmatively claimed an exemption for specific materials, but instead insisted on payment of its fee, does not, of itself, place Mr. Zaitz's request in an "impermissible limbo." Instead, it generally appears that OST may require Mr. Zaitz to prepay its fees before undertaking the work necessary to determine the extent to which OST ultimately wishes to claim an exemption.

OST's Fee Estimate

We note, however, that OST has provided Mr. Zaitz with a fee estimate that is fundamentally different from the fee contemplated by ORS 192.440(4). Rather than estimating the cost of compiling and reviewing requested records, segregating exempt material from non-exempt material, and making non-exempt material available, OST's estimate reflects the cost to OST of contacting the general partners in the affected investments and securing their permission to disclose the documents ***regardless of*** any possible exemption. The failure to provide Mr. Zaitz with an option whereby he can obtain only that information that is ***not exempt***, regardless of whether third parties consent to the disclosure, does have the effect of improperly denying Mr. Zaitz's request.

We emphasize that OST was free to give Mr. Zaitz the ***option*** of proceeding in the manner suggested by its estimate. Indeed, we understand that OST's belief is that such an approach could possibly provide Mr. Zaitz with more information at a lower cost than if OST were to instead segregate exempt from nonexempt materials. Nevertheless, Mr. Zaitz has the

[1] A fee may not, however, include "the cost of time spent by an attorney for the public body in determining the application of the provisions of [the Public Records Law]." ORS 192.440(4)(b).

right to require OST to provide non-exempt materials even if the general partners in OST's investments might object. OST must provide Mr. Zaitz with an estimate reflecting the expected cost of doing so. That cost should not include the cost to OST of soliciting "permission" from the various general partners regarding Mr. Zaitz's request.

We reiterate that the non-exempt information available through this mechanism may not be as extensive as the information that Mr. Zaitz may be able to obtain through the process suggested by OST. Once the estimate is provided, Mr. Zaitz can evaluate whether he wishes to proceed in the alternative manner suggested by OST, pay the fee and obtain that information which is not exempt from disclosure (and thus is subject to disclosure without third-party permission), or combine the two approaches in some way. The failure to provide Mr. Zaitz with a fee estimate for the cost of obtaining only non-exempt documents has the effect of rendering his access to non-exempt records wholly subject to a third party's willingness to allow disclosure. OST is required to disclose non-exempt records regardless of third-party permission, and notwithstanding any contractual requirements to the contrary. *Guard Publishing Co. v. Lane County School Dist. No. 4J*, 310 Or 32, 39 (1990) (public bodies cannot contract around obligations of the public records law; exemptions must be express). Failing to provide an estimate reflective of that obligation improperly infringes on Mr. Zaitz's statutory right to access OST's non-exempt documents.

We order OST to provide Mr. Zaitz with the statutorily-required estimate.

Fee Waiver Request

We proceed to evaluate Mr. Zaitz's request that we order OST to waive its fees. This endeavor is complicated by the fact that the only fee estimate generated by OST is an estimate for the cost of approaching OST's partners about voluntary disclosure regardless of exemption. Unless and until otherwise ordered, the Public Records Law does not require OST to provide records it believes are exempt *at all*, never mind provide them at no cost. OST believes, however, that if Mr. Zaitz were to pay the estimated fee amount, OST would be able to provide Mr. Zaitz with the vast majority of the materials he has requested. Consequently, we proceed on the assumption that the $788.50 fee at least reasonably approximates the *maximum* cost Mr. Zaitz could incur in pursuit of these records. If the fee for providing non-exempt records exceeds the fee for pursuing approval from the general partners – and we do not have any reason to expect that it will – then we assume for these purposes that Mr. Zaitz will choose to pay the lower amount of $788.50, or choose not to pay at all.

Under ORS 192.440(5), a public body may generally reduce or waive fees if it determines that doing so is in "the public interest because making the record available primarily benefits the general public." OST does not dispute that making the requested records available to Mr. Zaitz would sufficiently serve the public interest to permit OST to waive its fees. In fact, OST has previously provided a significant volume of related information to Mr. Zaitz at no additional cost.

But even when a public body is permitted to waive its fees, however, the public body may exercise its discretion to deny a request for a wavier. *In Defense of Animals v. Oregon Health Sciences University*, 199 Or App 160, 189 (2005). A public body must exercise its

right to require OST to provide non-exempt materials even if the general partners in OST's investments might object. OST must provide Mr. Zaitz with an estimate reflecting the expected cost of doing so. That cost should not include the cost to OST of soliciting "permission" from the various general partners regarding Mr. Zaitz's request.

We reiterate that the non-exempt information available through this mechanism may not be as extensive as the information that Mr. Zaitz may be able to obtain through the process suggested by OST. Once the estimate is provided, Mr. Zaitz can evaluate whether he wishes to proceed in the alternative manner suggested by OST, pay the fee and obtain that information which is not exempt from disclosure (and thus is subject to disclosure without third-party permission), or combine the two approaches in some way. The failure to provide Mr. Zaitz with a fee estimate for the cost of obtaining only non-exempt documents has the effect of rendering his access to non-exempt records wholly subject to a third party's willingness to allow disclosure. OST is required to disclose non-exempt records regardless of third-party permission, and notwithstanding any contractual requirements to the contrary. *Guard Publishing Co. v. Lane County School Dist. No. 4J*, 310 Or 32, 39 (1990) (public bodies cannot contract around obligations of the public records law; exemptions must be express). Failing to provide an estimate reflective of that obligation improperly infringes on Mr. Zaitz's statutory right to access OST's non-exempt documents.

We order OST to provide Mr. Zaitz with the statutorily-required estimate.

Fee Waiver Request

We proceed to evaluate Mr. Zaitz's request that we order OST to waive its fees. This endeavor is complicated by the fact that the only fee estimate generated by OST is an estimate for the cost of approaching OST's partners about voluntary disclosure regardless of exemption. Unless and until otherwise ordered, the Public Records Law does not require OST to provide records it believes are exempt *at all*, never mind provide them at no cost. OST believes, however, that if Mr. Zaitz were to pay the estimated fee amount, OST would be able to provide Mr. Zaitz with the vast majority of the materials he has requested. Consequently, we proceed on the assumption that the $788.50 fee at least reasonably approximates the *maximum* cost Mr. Zaitz could incur in pursuit of these records. If the fee for providing non-exempt records exceeds the fee for pursuing approval from the general partners – and we do not have any reason to expect that it will – then we assume for these purposes that Mr. Zaitz will choose to pay the lower amount of $788.50, or choose not to pay at all.

Under ORS 192.440(5), a public body may generally reduce or waive fees if it determines that doing so is in "the public interest because making the record available primarily benefits the general public." OST does not dispute that making the requested records available to Mr. Zaitz would sufficiently serve the public interest to permit OST to waive its fees. In fact, OST has previously provided a significant volume of related information to Mr. Zaitz at no additional cost.

But even when a public body is permitted to waive its fees, however, the public body may exercise its discretion to deny a request for a wavier. *In Defense of Animals v. Oregon Health Sciences University*, 199 Or App 160, 189 (2005). A public body must exercise its

discretion "reasonably," which means that its decision must appropriately take into account the totality of the circumstances presented. *Id.* at 190. 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 public body. Of course, we do not foreclose the possibility that other considerations may be appropriate in any given case. We conclude that OST's refusal to waive its fees in this instance is reasonable.

With respect to the character of the public interest in the particular disclosure, we are aware that Mr. Zaitz has co-authored a number of widely-discussed front-page stories in The Oregonian describing OST employees' travel to, and activities at, investment-related meetings. Regardless of whether the records at issue here would show further instances like those previously reported by Mr. Zaitz, or instead show greater focus on the substance of state business, we recognize a significant public interest in the disclosure of these records to Mr. Zaitz.

Under some circumstances, a $788.50 fee could easily present a significant impediment to the public interest served by disclosure of records. But the requester here is a reporter for the largest newspaper in Oregon. Stories in this series have consistently appeared on the front page of the Sunday edition. That context is relevant to assessing the degree to which the fee impedes disclosure. *See, for example*, 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). Given the relationship of the $788.50 fee to the requester's apparent ability and incentive to pay, we cannot conclude that the fee presents a significant impediment to the public interests that would be served by disclosure. Of course, we also cannot conclude that waiving the fee would, of itself, be a significant burden to OST.

We make two other observations concerning circumstances relevant to Mr. Zaitz's request. First, the Oregon Public Employee Retirement Fund (OPERF) is the primary source of the investments about which Mr. Zaitz inquires. That fund is a trust fund dedicated to the benefit of PERS members. ORS 238.660. OST has a duty to consider carefully the uses to which OPERF funds are put. OST believes that it has "exercised every ounce of discretion available to [it] in utilizing retirement funds to waive [related public records requests] fees for the Oregonian's expensive and intrusive investigation." Undated letter from Jen Peet to Les Zaitz. Though we express no view with respect the intrusiveness of the Oregonian's investigation, we readily believe that the investigation has been relatively expensive for OST. Second, OST has provided a significant volume of materials to Mr. Zaitz at no charge, and we think it is appropriate to consider the whole of the series of requests when considering the reasonableness of OST's determination that it will not waive these particular fees. If something about the content of the particular records suggested that disclosure of the records might potentially embarrass OST, we might be more inclined to consider Mr. Zaitz's suggestion that the decision to charge fees at this stage "appears punitive." The reality, however, is that the documents we reviewed appear to focus largely on the substantive business of OST's investments.

Overall, we conclude that OST reasonably declined to waive its fee. As noted above, however, OST is required to provide Mr. Zaitz with an estimate of the cost to review the existing records and provide non-exempt materials without including any cost for consulting the general partners of its investments. If Mr. Zaitz believes that something about that fee estimates

warrants a different result with regard to the fee waiver question, Mr. Zaitz naturally may file a petition. For reasons explained above, however, our expectation is that this analysis is unlikely to change.

Application of Exemption

As noted above, OST has not asserted that any particular information is exempt from disclosure. In addition, OST may require Mr. Zaitz to prepay its fees before undertaking the work necessary to determine the extent to which OST ultimately wishes to claim an exemption. And OST is not required to waive its fees. Under those circumstances, Mr. Zaitz's request that we determine that the records are not exempt from disclosure is not ripe. Nevertheless, our analysis above implies something about the status of the documents that we now make explicit: our initial review of the documents provided to us by OST indicates that there is a plausible basis for asserting that the exemption in ORS 192.502(14) applies to some, but not all, of the information in the documents requested by Mr. Zaitz. To qualify for that exemption, we believe that information must relate not only to the investment vehicle itself, but also to the state's investment *in* the "privately placed investment fund or a private asset." Moreover, the specific types of information listed in ORS 192.502(14) as examples of exempt materials indicate that information must *substantively* relate to the state's investment in an investment vehicle in order to qualify for exemption. *See Schmidt v. Mt. Angel Abby*, 347 Or 389, 403-404 (2009) (the principle of *ejusdem generis* appropriately informs the meaning of statutes with lists of things that the statute includes, but is not limited to.) Because OST has not asserted that any particular information is actually exempt, and has not received payment of fees that cover steps necessary to make that determination, it would be premature to determine what materials may actually be subject to disclosure.

Conclusion

For the reasons given above, we conclude that OST has improperly denied Mr. Zaitz's request by failing to provide him with an estimate of the cost of providing all of the non-exempt materials he requested. To that extent, we grant Mr. Zaitz's petition and order OST to provide an estimate of that cost. On the assumption that the existing estimate reasonably approximates the maximum coast to Mr. Zaitz of obtaining these records, we conclude that OST reasonably declined to waive the fees associated with Mr. Zaitz's request. To that extent, we deny Mr. Zaitz's request. Implicit in our reasoning is the conclusion that some of the requested materials, but not all of them, plausibly may be exempt from disclosure under ORS 192.502(14). But determining which materials may be subject to compelled disclosure would be premature in light of the fact that OST has not yet received payment of its fees.

Sincerely,

Mary H Williams

MARY H. WILLIAMS
Deputy Attorney General

DM2082704