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May 17, 2010

Tom Dimitre
901 Beach St.
Ashland, OR 97520

Re: Petition for Review of Denial of Fee Waiver:
Department of Fish and Wildlife

Dear Mr. Dimitre:

This letter is the Attorney General's order on your petition for review of the denial by the Department of Fish and Wildlife of your request for a waiver of fees under the Public Records Law, ORS 192.410 to 192.505. Your petition, which was received on April 28, 2010, asserts that the Department abused its discretion by denying your request for a complete fee waiver.[1] You also assert that the Department's fee estimate was not reasonably calculated. 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 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). "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). 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." ATTORNEY GENERAL'S PUBLIC RECORDS AND PUBLIC MEETINGS MANUAL (MANUAL) at 20, 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

[1] We appreciate your courtesy in extending the time within which the law would otherwise require a response to May 17, 2010.

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 the Department by a letter dated November 23, 2009:

> I am requesting access to and a copy of any and all studies or surveys regarding water quality, pollutants, and wildlife on the Willamette River, Oregon, including, but not limited to: water quality studies, pollution studies, mixing zones, surveys of fish and/or wildlife (including, but not limited to salmon), drinking water and beneficial uses of the Willamette River, occurring from point and non point source from the period beginning 1990 to present.

You also requested a total waiver of any fees associated with providing the requested records to you. The Department responded to your request and estimated its costs in providing the requested records to you at $7,584.50.

On May 15, 2009, Roy Elicker, the director of the Department, sent you a letter which addressed in detail your fee waiver request. After describing his consideration of the circumstances, he denied your request for a total fee waiver.

Analysis

Your petition asks the Attorney General to order the Department to waive the entire fee. We begin by addressing the Department's calculation of its fee. We then evaluate the Department's exercise of its discretion in denying your request for a fee waiver.

1. The Department's Fee Estimate

In general, the Attorney General does not have authority to review the reasonableness of an agency's public records fees, or to determine whether those fees accurately reflect the actual cost to the agency of providing access to its public records. MANUAL at 16-17. The Attorney General's authority to enforce the inspection provisions of the Public Records Law may require the Attorney General to review a fee that appears to be grossly excessive under circumstances suggesting that the true purpose of the fee is to deny access to records. Public Records Order, March 23, 2009, Kellington at 4. Although the estimated fee in this case in substantial, we cannot say it is grossly excessive under the circumstances, or that it is actually intended to deny you access to records.

First, your initial request was very broad and encompassed 14,266 pages of records spread across five offices. Responding to your original records request would have required a significant expenditure on the part of the Department, and the fee estimate reflects that fact.

In your petition, you said "I suspect that nearly all of this information is in electronic format, so there would be no copying charges, etc. What is required is that each employee do a

search of their computer with a few key search words." According to the Department, most of records exist at the Department only in hard copy, and few of those hard copies are indexed on any kind of computerized system. To locate them, staff must pull, examine, organize, copy, and then refile dozens of files (some of which may first need to be retrieved from archives).

The Department has indicated its willingness to work with you to reduce the scope of your request and hence the resulting costs. In light of these realities, we cannot say that the Department's estimated fee appears to be grossly excessive or that circumstances suggest the true purpose of the fee is to deny access to the records.

In your petition, you have offered to forego copies of the documents and instead inspect each record. You have also indicated that you are willing to amend the time period covered by your request from 1990 to the present, to 1999 to the present. The Department's original estimate was based upon your earlier request for copies of the documents from the longer period. This more limited request would likely reduce the cost estimate, if you presented it the Department. For example, the original estimate includes $4,566.50 for 14,266 copies.

Nevertheless, it seems very likely that gathering the records for your inspection would require significant effort by Department staff (and therefore significant cost). To make many, many pages of public records available for inspection while ensuring the integrity of the records and facilitating their refiling, Department staff would be required to locate and gather the records, oversee their inspection, and refile them correctly. The Department has not provided a cost estimate for this task, because you have not requested one.

2. The Department's Refusal to Waive its Fee

We next address your contention that the Department abused its discretion when it refused to waive the entirety of its public records fee. As we state above, ORS 192.440(5) provides that records custodians "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."

Under this statute, 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." We think it very likely that your request meets the public interest test, particularly in light of the additional information that you provided in your petition for a public records order.

However, even granting that you made a strong showing of a public interest in disclosure, that conclusion would not mean that the Department was required to waive its entire 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 the Department's decision with respect to your waiver request was reasonable, we must "examine the totality of the circumstances presented." *Id.* at 189-190. Your petition argues that Director Elicker's April 15, 2010 letter improperly weighs the relevant factos and erroneously denies the requested waiver.

Director Elicker's letter cites to and quotes from the factors listed in the MANUAL at page 21. Those factors are properly considered.

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.[2] 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.

In this case, we believe that the Department has explained the significant burden on the agency that would result from waiver of its fee. As previously noted, your original request – and the only one for which we have a fee estimate – spans a twenty year period and relates generally to a major subject of the Department's work. Responding to your very broad request would require additional work of Department staff that is normally devoted to other work. Director Elicker's letter explained the grim budgetary situation facing the State of Oregon. *See* MANUAL at 21.

The amount charged per hour for staff time appears reasonable. The Department charges the $28 per hour for staff time, regardless of the actual pay rate of staff responding to the request. Department Policy D0_100_03 (effective 5/28/08); Cost Estimate dated 1/5/10.

You question the Department's statement that a fee-waiver request "asks the Department to absorb several thousand dollars in actual cost to the agency." You allege instead that "ODFW employees will provide this information to me in the course of their duties---it is actually one of their duties to provide this information to the public." The Department informs us that the only

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

employees knowledgeable about the records you requested are fisheries or wildlife biologists (not public information and education specialists). While other staff may be able to perform with some activities associated with your request, these biologists would be the ones to track down the files and locate the individual documents within them. This would involve diverting these biologists from their usual duties of biological analysis, scientific research and policy development.

With respect to the character of the public interest served by disclosure, the volume of responsive records makes it difficult to do more than speculate. Certainly the overall health of the Willamette River is a matter of significant public interest. Historical information about the health of the river may also be of interest to the public. But the sheer breadth of your request makes it seem unlikely that every document you are asking the Department to make available to you would significantly advance the public interest.

Conclusion

For the reasons described above, we conclude that the Department did not abuse its discretion when it decided not to grant your request for a complete fee waiver. As a result, we must respectfully deny your petition.

Sincerely,

for MARY H. WILLIAMS
Deputy Attorney General

DM2043760
c: Roy Elicker, Director, Oregon Department of Fish and Wildlife