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May 17, 2010

Peter Ferris, Executive Director & Lobbyist
Oregon Manufactured Homeowners United
PO Box 309
Waldport, OR 97394

Sandy McDonnel, Administrative Services Manager
Oregon Housing & Community Services
North Mall Office Building
725 Summer St. NE, Ste. B
Salem, OR 97301

Re: Petition for Public Records Disclosure Order:
Oregon Housing & Community Services Records

Dear Mr. Ferris and Ms. McDonnel:

On May 10, 2010, we received a petition from Mr. Ferris appealing the refusal of Oregon Housing and Community Services Department (HCSD) to waive the fees associated with Mr. Ferris' request for certain documents. Mr. Ferris had initially requested six categories of records:

1. The last five years revenues generated by the six-dollar fee [established by] (ORS 446.525).
2. The last five years of the detailed, itemized expenditures of this same account, for all the programs it funds within or outside the Department.
3. The last five year data regarding mediation of disputes, including number of calls received, # whether tenant or landlord initiated, # mediated, # resolved, # kind of dispute, and # in the geographical areas they occurred in.
4. The last five years of complaints received regarding staff in the Center, whether tenant or landlord initiated, the nature of the complaints, what steps the Department took in handling them, and what constituted the resolution of the complaints.
5. A copy of the rules to carry out the provisions of 90.771.

6. Last three years of revenue and expenditures of the resident park purchase account.

HCSD estimated that the cost of providing these records would be $700.00, and denied Mr. Ferris' request for a fee waiver based on the conclusion that "we do not believe that release of the records will primarily benefit the general public."

Mr. Ferris's petition stated that he was willing to narrow his request to items 3 and 4 on this list, and during the course of the petition process Mr. Ferris subsequently did so. HCSD stated that the fees applicable to those portions of the request would be $181.00, and declined to revisit its refusal to waive the fee. In light of those developments, Mr. Ferris asked that we issue a determination whether HCSD lawfully refused to waive the $181.00 fee based on the conclusion that disclosure would not primarily benefit the general public. Because Mr. Ferris's narrower request is a subset of his original request, and in light of the fact that HCSD has stated its position, we proceed to consider Mr. Ferris's petition in its narrowed form.

We conclude that HCSD's determination with respect to the public interest was incorrect, as we explain below. We consequently order HCSD to determine whether, under the totality of the circumstances presented, HCSD will exercise its discretion to waive or substantially reduce the amount of its estimated fee.

Oregon's Public Records Law, ORS 192.410 to 192.505, confers upon "any person" the right to inspect any public record of an Oregon public body, subject to express exemptions. ORS 192.420. In providing access to public records, the custodian of a public record may establish and charge fees that are reasonably calculated to reimburse the actual cost of making the records available. ORS 192.440(4)(a). However, "[t]he 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). "A person who believes that there has been an unreasonable denial of a fee waiver or fee reduction" may seek review of the denial. ORS 192.440(6).

The Oregon Court of Appeals has explained when fee waivers are permitted under ORS 192.440(6):

> [W]aiver or reduction of fees for the furnishing of a public record is "in the public interest because making the record available primarily benefits the general public" as provided in ORS 192.440(4) when the furnishing of the record has utility – indeed, its greatest utility – to the community or society as a whole.

In Defense of Animals v. OHSU, 199 Or App 160, 189 (2005).

Mr. Ferris's request explained that the information requested would "enable homeowners to evaluate [the] program" about which he was inquiring – a dispute resolution program that is

funded by a $6 assessment "levied annually upon each manufactured dwelling that is assessed for ad valorem property tax purposes as personal property," ORS 446.525. Mr. Ferris stated that he was unaware of any information publicly available that would facilitate such an evaluation, and asserted that the ability of the public to perform such an evaluation would be "in the best interest of homeowners, landlords, and the general public." Mr. Ferris's request was made in his capacity as Executive Director and Lobbyist for Oregon Manufactured Homeowners United (OMHU). OMHU maintains a website through which it publicly distributes news and policy proposals related to manufactured homes, http://omhu.org/.

We conclude that Mr. Ferris's explanation of the public interest meets the threshold imposed by ORS 192.440(5). HCSD's determination that disclosure of the records would not primarily benefit the general public was in error.

Our conclusion that disclosure would primarily benefit the public does not mean that HCSD was necessarily required to waive or substantially reduce its fee. "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, HCSD's decision "must be reasonable. Reasonableness is an objective standard, under which we examine the totality of the circumstances presented." *In Defense of Animals*, 199 Or App 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 agency.[1]

Because HCSD incorrectly concluded that disclosure of the requested records would not primarily serve the public interest, HCSD has not exercised the discretion that is required of it under the law. We consequently order HCSD to reconsider its decision under the applicable statutory standard. If Mr. Ferris is dissatisfied with HCSD's decision on reconsideration, he is free to petition anew.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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