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April 8, 2010

Tom Dimitre
901 Beach St.
Ashland, OR 97520

Roy Elicker, Director
Oregon Department of Fish & Wildlife
Office of the Director
3406 Cherry Ave. NE
Salem, OR 97303

Re: Public Records Disclosure Order:
Oregon Department of Fish & Wildlife Records

Dear Mr. Dimitre & Mr. Elicker:

On April 1, 2010, we received Mr. Dimitre's petition claiming that the Oregon Department of Fish & Wildlife (ODFW) had unreasonably denied his request for a fee waiver. Mr. Dimitre made a very broad request for records from ODFW:

> 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 surveys, 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[s] from the period beginning 1990 to present.

Letter from Mr. Dimitre to ODFW, November 23, 2009. Mr. Dimitre requested that ODFW waive fees associated with this request. ODFW estimated that responding to this request would cost $7584.50. ODFW denied the request for a waiver:

> Unfortunately, the Department has not granted any waivers of public records request fees. Due to the budget crisis in state government, the Department does not grant fee waivers to any person or group. ODFW believes that the public interest in keeping state agency costs low, especially during the current budget crisis, outweighs any public interest in making records available free of charge.

Email from Teri Kucera, ODFW, to Mr. Dimitre, January 12, 2010 4:03:03 PM. Mr. Dimitre argues that this response does not comply with the Oregon Public Records Law, ORS 192.410 to 192.505. We agree.

The Public Records Law provides that "Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.420(1). In providing access to its records, "[a] public body may establish fees reasonably calculated to reimburse the public body for the public body's actual cost of making public records available." ORS 192.440(4)(a). A public body may waive or significantly reduce those fees if it "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). Finally, "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).

We note that, "[a] public body has discretion whether or not to grant a fee waiver or reduction" even if the waiver would be in the public interest. ***In Defense of Animals v. Oregon Health Sciences University***, 199 Or App 160, 189 (2005). Even so, however, "the public body's discretion must be exercised within the range of lawful options available to it under the relevant law." *Id.* Specifically, the applicable standard of "reasonableness" is "an objective standard" that requires an examination of "the totality of the circumstances presented." *Id.* at 190.

Simply put, the required exercise of discretion is incompatible with ODFW's categorical determination that "the public interest in keeping state agency costs low, especially during the current budget crisis, outweighs any public interest in making records available free of charge." Although the budget situation facing a state agency is relevant to the proper evaluation of a fee waiver request, according it determinative weight in all circumstances is fundamentally incompatible with the required consideration of "the totality of the circumstances presented." ***In Defense of Animals*** at 190. On these facts, we must conclude that ODFW's decision was unreasonable.

ODFW must revisit its decision under the discretionary standard applicable to requests for fee waivers and fee reductions. Some relevant factors for ODFW to consider are discussed in the ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) at pp. 17-21, available at http://www.doj.state.or.us/pdf/public_records_and_meetings_manual.pdf. We also considered the standard applicable to fee waiver requests in Public Records Order, September 11, 2009, Wright, and Public Records Order, September 10, 2009, Rogers (copies enclosed).

We express no view as to whether the relevant factors would require ODFW to grant a waiver or reduction of fees in these circumstances. We merely find that ODFW's blanket determination that its fees will not be waived is inconsistent with the legislative judgment expressed in ORS 192.440(5), and order ODFW to exercise its discretion with respect to the particular facts presented by Mr. Dimitre's request, as the law requires. ODFW has seven days

to comply. If Mr. Dimitre disagrees with the decision reached by ODFW under the applicable standard, he may again petition our office to review ODFW's determination.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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