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February 4, 2010

SENT VIA E-MAIL

Professor William T. Harbaugh
538 PLC
1285 University of Oregon
Eugene, OR 97403-1285
(wtharbaugh@gmail.com)

Re: Petition for Public Records Disclosure Order:
University of Oregon Records

Dear Professor Harbaugh:

On January 28th, 2010, you emailed the Attorney General seeking a Public Records Order directing the University of Oregon (UO) General Counsel and Oregon Special Assistant Attorney General Melinda Grier to waive a proposed fee for providing a copy of a public record, which you describe as the current working draft of UO's 2009-2010 Affirmative Action Plan. For the reasons set forth below, we respectfully deny your petition.

Your petition follows UO's email to you of January 27, 2010, estimating the cost of responding to your public records request to be Seventeen Dollars and Seventy-Two Cents ($17.72). That email states that "[to] the extent that you have requested a full waiver of this fee, the request is respectfully denied."

In support of your petition seeking a fee waiver, you state that federal regulations require UO to prepare Affirmative Action Plans, (AAP) update them annually, and make copies available "for inspection and copying." You assert that the working draft is the "closest thing UO has to a valid Affirmative Action Plan" and that it is clearly in the public interest to make it available for inspection without a fee, because "federal regulations rather clearly envision" that the final document be freely available.

UO states that it expects to have the AAP completed, though it may be several weeks before that is done. At that time, UO intends to make the AAP freely available. We analyze your petition in that light.

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). Public records requesters may petition the Attorney General if they are dissatisfied with a public body's response to a request for waiver. ORS 192.440(6).

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). We assume that disclosure of the draft AAP would sufficiently serve the public's interest that UO could choose to waive or substantially reduce its fees.

By itself, however, that conclusion does not mean that UO was required to waive its fees. 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 UO'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, even if we might have reached a different decision.

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.[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.

We begin by determining that there is not a substantial public interest in this particular disclosure. As we have already mentioned, UO expects to complete the AAP in the not-too-distant future, and will freely disclose the final version. That may take several weeks, but it is not apparent to us that having a draft version publicly available in the meantime would significantly advance the public interest. We note that, by their nature, drafts are subject to review, change and correction. To the extent that a draft contains erroneous information, unclear statements, or placeholders, administrators' reliance on a draft could actually be detrimental to the public's interest. Of course, administrators are likely to know that, and consequently unlikely to rely on the draft. Given the questionable utility of a draft, and the fact that the final version will be freely available, we cannot perceive a substantial public benefit that would result from the requested disclosure.[2]

We next ask whether the fee amount of $17.72 is a significant impediment to disclosure. We conclude that it is not.

Finally, we look to the burden that waiver would impose upon UO. The fee estimate suggests that the burden of producing the records would be slight. However, the overall volume of your public records requests is relevant to assessing the reasonableness of UO's decisions with respect to your requests that UO waive its fees.

Considering the totality of the circumstances, we cannot conclude that UO acted unreasonably in denying your request for a fee waiver. Your petition is respectfully denied.

Sincerely,

MARY H. WILLIAMS
Deputy Attorney General

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c: Doug Park, University of Oregon

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

[2] In reaching this conclusion, we do not purport to resolve whether federal law requires UO to currently have the final AAP in place and freely available. That question is beyond the scope of our authority under ORS 192.450(1). Our analysis here is limited to the significance of the public interest in present disclosure of a draft AAP. Regardless of the answer to the federal question you present, we believe that a draft AAP's shortcomings would significantly diminish the public interest in disclosure.