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January 22, 2010

Jacob Szeto
Cascade Policy Institute
4850 Scholls Ferry Rd., Suite 103
Portland, OR 97225

Re: Petition for Public Records Order: Denial of Request for Fee Waiver
Oregon Department of Energy (ODOE)

Dear Mr. Szeto:

On January 11, 2010, we received your petition asking the Attorney General to determine that ODOE did not respond reasonably to your fee waiver request. ORS 192.440(6). You agreed to extend our statutory deadline for responding to your petition until January 22, 2010, and we thank you for that courtesy. For the reasons that follow, we are compelled to respectfully deny your petition.

The records you requested relate to the Department of Energy's contract with EcoNW and requested "all e-mail communications between ODOE and EcoNW between 6/1/08 and 11/15/09." At that time you also requested a waiver of the fees for your records request.

We note at the outset that ODOE has not denied your request for records, but has instead conditioned disclosure on payment of its fees. In an e-mail letter to you dated January 11, 2010, Gary Basin, Project Manager at ODOE, indicated that ODOE would provide the records upon receipt of payment of $675.00. ODOE also determined to deny your request for a fee waiver. After you filed your appeal with the Department of Justice, ODOE reviewed the appeal and informed you that it would provide you with the records upon your payment of half of that amount, $337.50. This information and a revised invoice were sent to you by e-mail on January 21, 2010.

By telephone communication with Michael Kron of the Attorney General's office on January 21, 2010, you asked that we rule on your petition notwithstanding ODOE's revised decision. You stated that ODOE's decision is effectively not a waiver, because there is another

requester who has made an overlapping request who is willing to split the full amount of the fee. You also stated, however, that the other requester had decided not to proceed with the request while your petition is pending.

Notwithstanding your arguments, we conclude that we must view ODOE's offer as a significant reduction of its fee. ODOE cannot be sure that the other requester will choose to proceed with her request to ODOE. Because we view ODOE's offer as a significant reduction of its fee, we proceed to analyze whether the law requires ODOE to do more.

The Public Records Law authorizes public bodies to "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). In general, the Attorney General has determined that the Public Records Law does not authorize the Attorney General to review fee amounts established by public bodies to determine whether the fee is reasonable. *See* ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2008) (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. Such circumstances are lacking here.

The Public Records Law also 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). The Public Records Law specifically authorizes public records requesters to 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). ODOE's decision on January 21, 2010 to waive a portion of its fee implicitly acknowledges that a waiver would serve the public interest, and we agree.

By itself, however, that conclusion does not mean that ODOE was required to do any more than it did. 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 ODOE'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.[1]

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.

We begin by determining that there is a substantial public interest in this particular disclosure. As we have already mentioned, the documents in question relate to the administration of the Business Energy Tax Credit program, which has received substantial attention in the press in recent weeks.

We next ask whether the remaining fee amount of $337.50 is a significant impediment to disclosure. As noted in your original appeal of the fee waiver denial, Cascade Policy Institute is an active participant in policy development in Oregon, testifying numerous times before the legislature and providing guest speakers throughout the state. In addition, you assert that the organization reaches a national audience. We cannot conclude that this fee amount will significantly impede Cascade Policy Institute's ability to obtain and disseminate the information in question.

Finally, as a general proposition, a waiver imposes on the public body whatever expense would otherwise be the requester's obligation. In evaluating the burden imposed on ODOE, we have considered various relevant factors listed in the MANUAL. Pertinent factors include the extent of time and expense and the interference with the business of the public body, volume of the records requested and the necessity to segregate exempt from non-exempt records and the

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[1] We note that the Attorney General has often upheld the reasonableness of a 25% fee waiver. MANUAL at 21. A 25% waiver is not conclusively reasonable in all circumstances, however.

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

extent to which an inspection of the records is insufficient for the particular needs of the requestor. MANUAL at 21. ODOE has stated that your request would require searches of individual employee computers for the information you seek, which would prohibit the employees from using their computers while the search was conducted. This would cause a substantial interference with the business of the agency. In addition, significant segregation of non-responsive material is necessary. ODOE thus found that the response to your request would be burdensome and determined that it must recover some of the costs of producing these documents

ODOE also based its determination to reduce the fee for your request on the fact that a second, similar request has been received by ODOE. The other request has not been finalized and ODOE has no certainty that any additional costs for producing these e-mail communications will be recovered.

Overall, we find that the reduction offered by ODOE is reasonable, and that ODOE was not required to do more.

We do not weigh those considerations anew ourselves. Our duty and authority is limited to reviewing whether ODOE abused its discretion by unreasonably denying your waiver request. Importantly, discretionary standards entail a "range of lawful options." ***In Defense of Animals***, 199 Or App at 189. Whether we might have weighed the circumstances differently in the first instance is of no moment, provided the agency has exercised its discretion reasonably. On balance, the degree to which ODOE's reduced fee impedes the public interest in disclosure is not unreasonable in comparison to the cost to ODOE of responding to your request. As a result, we must respectfully deny your petition.

Sincerely,

DAVID E. LEITH
Associate Attorney General

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c: Gary Basin, ODOE