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August 8, 2011

Conrad R. Engweiler, SID #8589408
OSCI- 3405 Deer Park Drive SE
Salem, OR 97310

Re: Petition for Public Records Disclosure Order:
Board of Parole and Post-Prison Supervision

Dear Mr. Engweiler:

This letter is the Attorney General's order on your petition for review of the denial by the Board of Parole and Post-Prison Supervision (the "Board") of your request for a waiver of fees under the Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on August 1, 2011, states that on June 9, 2011, you asked the Board to "inform [you] of the fees" for the following records:

> Any and all public records held by the Board or the Advisory Commission on Prison Terms and Parole Standards (Commission) (ORS 144.775) that show that the Board or the Commission examined the facts of my crime or my history (criminal or otherwise) in the course of drafting the JAM rules from 1996 up to 1999, and/or before those rules were formally adopted and applied to my case in June 1999. These public records should, at a minimum, include those writings used as evidence in *White v. Belleque*, USDC Case No. 02-630-TC, *Findings and Recommendation* (D. Or. Filed Oct 21, 2010), showing that the Board and Commission prejudged those juvenile offenders' cases.

In response, the Board sent an "invoice" dated June 22, 2011, for a total amount of $64.05, which included a fee for 1.0 hour of staff time, 1.0 hour of the Board Chairman's time, and 20 page copies. Your petition further states that on July 1, 2011, you requested a waiver or reduction in the fee, and that the Board denied that request. In your petition, you assert: (1) the $64.05 fee was unreasonable and unauthorized without your prior approval; and (2) the Board should have granted your fee waiver request because you are unable to pay and because the records primarily benefit the public. For the reasons set forth below, we deny your petition.

A. The reasonableness of the "fee" in the Board's June 22, 2011 invoice

We first consider your assertion that the Board's June, 22, 2011 invoice was in violation of the Public Records Law. You assert that the Board's $64.05 fee estimate is unreasonable because the Board failed to explain "why [your] records request required 1 hour of the chairman's and 4 per quarter hours of records specialist's time." You further assert that the invoice violated ORS 192.440(4)(c) because the Board charged you a fee without your prior confirmation that you wished to proceed.

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. ORS 192.440(4)(a) provides that the Board "may establish fees reasonably calculated to reimburse the public body for the public body's actual cost of making public records available, including costs for summarizing, compiling or tailoring the public records, either in organization or media, to meet the person's request." ORS 192.440(4)(c) further requires that the Board "may not establish a fee greater than $25 under this section unless the public body first provides the requestor with a written notification of the estimated amount of the fee and the requestor confirms that the requestor wants the public body to proceed with making the public record available." The Public Records Law does not specifically confer upon the Attorney General the authority to assess the reasonableness of a public body's assessed fees. Nevertheless, "[t]he Attorney General's authority to enforce the inspection provisions of the public records law may require the Attorney General to evaluate an agency's fees where the amount of the fee in comparison to the nature of the request suggests that the true purpose of the fee is to constructively deny the request, rather than to recoup the agency's actual costs." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2011) ("MANUAL") at 17.

We spoke with Aaron Felton, Chairman of the Board, about your petition. He informed us that the "invoice" is an estimate of the fee amount for producing the public records, which the Board prepared in light of your request for information about the fees for your request. He told us that the fee estimate was based on a low estimate of the time that would be necessary to compile and tailor your records request. He stated that at least 1.0 hour of staff time will be necessary to collect the documents you requested from different storage locations, and that the number of documents described in your request may be large enough to fill a banker's box. He also explained that at least 1.0 hour of the Board Chairman's time was necessary because your request would require a subjective assessment as to whether certain requested materials "show that the Board or the Commission examined the facts of my crime or my history (criminal or otherwise) in the course of drafting the JAM rules" and that that assessment could not be easily or properly made by staff. With respect to the number of copies, he explained that he had not yet reviewed the materials to determine what number of records might satisfy your document request and instead provided the figure of 20 pages as an estimate of the number of documents that might fit within your request.

Based on the information that you and the Board provided, we see no basis to conclude that the fee assessed by the Board was unreasonable. And, because the Board did not "proceed with making the public record[s] available" before providing you with a statement of the estimated cost, we cannot conclude that the Board violated ORS 192.440(4)(c). We therefore deny your petition with regard to those issues.

B. The Board's denial of your fee waiver request

We next consider your assertion that the Board unreasonably denied your request for a fee waiver or reduction.

ORS 192.440(4) authorizes a public body to waive fees if it determines that the waiver is in the public interest "because making the record available primarily benefits the general public." A matter is "in the public interest" "when it affects the community or society as a whole, in contrast to a concern or interest of a private individual or entity." *In re Defense of Animals*, 190 Or App 160, 188 (2005). The public interest test is satisfied "when the furnishing of the record has utility – indeed, its greatest utility – to the community or society as a whole." *Defense of Animals*, 190 Or App at 189; MANUAL at 18.

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." MANUAL at 20. We have determined that a public body's fee-waiver decision should generally 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 public body." MANUAL at 21.

We spoke with Mr. Felton about the denial of your fee waiver request. He told us that he understands that there is a public interest in the questions to which you relate your request. He stated that he is aware of possible media interest in this topic. But unlike any media representatives that might take an interest in the matter, you have a clear personal interest in the materials that you have requested; any public interest served by disclosure to you would seem to be secondary to that personal interest. Moreover, you do not have the same ability to disseminate the information to the general public. In light of the amount of work anticipated to meet the request, the relatively modest amount of the estimated fee, and the specific nature of the public interest, we cannot conclude that the Board was required to grant your fee waiver request. We respectfully deny your petition.

Sincerely,

DAVID E. LEITH
Associate Attorney General

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c: Aaron Felton, Board of Parole & Post-Prison Supervision