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March 9, 2011

SENT VIA EMAIL ONLY

Professor William T. Harbaugh
538 PLC
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(wtharbaugh@gmail.com)

Re: *Petition for Review of Denial of Fee Waiver*:
Oregon University System Records

Dear Professor Harbaugh:

This letter is the Attorney General's order on your petition for review of the Oregon University System's (OUS's) denial of your request for a waiver of fees under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on March 2, 2011, relates to your February 4, 2011 request from OUS for:

1) Brief descriptions (date, destination, amount, and the purpose, if that's easily available) of all travel since 7/1/2006 paid for by OUS. The BANNER printouts of the sort you provided for Treetops costs would be suitable.[1]

2) A more detailed breakdown of expenses for the trip which included the [OUS Jubilee Delegation] event . . . in Heidelberg Germany in June 2008. The program lists George Pernsteiner, Cheryl Fisher, and Ben Fisher as OUS delegates. (I think this should be Fischer, not Fisher). I am looking for documents which show what OUS paid in costs for travel for these three, including hotels, transportation and meals, during the entire extent of the trip from Oregon and back, not just for the dates in this event. This does not have to be the original receipts, the BANNER detailed transaction report or similar would be fine.

[1] On February 15, 2011, you clarified that "month by month and in/out of state breakdowns" would satisfy the first part of the request.

You also sought "a fee waiver on the grounds of public interest," which you offered to "demonstrate on request."

OUS responded to your request on February 16, 2011. OUS estimated that its fees to cover your request would total approximately $159.48 and denied your request for a fee waiver. Charles L. Triplett III, Secretary of the Board, explained: "I feel that my responsibility as a steward of OUS resources requires a 'reasonably calculated' fee to 'reimburse the public body for the public body's actual cost of making public records available[.]' ORS 192.440(4)(a). Additionally, the overall volume of your recent records requests is relevant to my decision." OUS then offered to disclose the requested documents if you prepaid the estimated costs of the request.

In response, you filed a petition asking the Attorney General to "order OUS to grant a public interest fee waiver and provide" you with the requested records. For the reasons that follow, we respectfully deny your petition.

Oregon Public Records Law authorizes a public body 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). Moreover, a public body may require prepayment of its estimated charges before taking further action on a request. Of course, if the actual charges are less than the prepayment, any overpayment should be refunded promptly. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2010) (MANUAL) at I.D.6.b.

A public body *may* waive its fees if it determines that waiver serves the "public interest because making the record available primarily benefits the general public." ORS 192.440(5). The Oregon Court of Appeals has explained that "[a] matter or action is commonly understood to be '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 Defense of Animals v. Oregon Health Sciences University*, 199 Or App 160, 188, 112 P3d 336 (2005). The requester carries the burden to establish that a waiver is in the public interest. MANUAL I.D.6.b.(2)(b); *see also* Public Records Order, March 27, 2002 (Zaitz).

In determining whether the request satisfies the public interest test, the relevant factors include: the requester's identity, the purpose for which the requester intends to use the information, the character of the information, whether the requested information is already in the public domain, and whether the requester can demonstrate the ability to disseminate the information to the public. Here, you have asserted that there is a "public interest in the costs of the Treetops/Portland situation, and travel costs for the Chancellor more generally."

Although this is a fairly general public interest, we assume that the disclosure you requested would primarily benefit the general public, and that waiver would adequately serve the public interest. However, ORS 192.440(5) does not require a public body to grant a fee waiver or reduction, even if the public interest test is met. "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 189-90.

When a public body denies a waiver request that would be permissible under ORS 192.440(5), the question is whether the agency acted reasonably in doing so. ORS 192.440(6). *See* Public Records Order, February 26, 2009 (Harbaugh) (explaining reasonableness standard). Reasonableness is an objective standard, requiring an examination of "the totality of the circumstances" underlying the request. *In Defense of Animals*, 199 Or App at 190.

The Manual explains how we evaluate claims that a public body unreasonably denied a waiver request:

> 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 public body. Of course, we do not foreclose the possibility that other considerations may be appropriate in any given case.

Manual at § I.D.6.b.(2)(c).

As noted above, the public interest you have identified is fairly general; it is ultimately an interest in the circumstances of specific public expenditures. It is true that the fee amount estimated by OUS may be significant from the perspective of a private citizen seeking public records that are of no apparent personal benefit to the individual. And we cannot say that waiving this particular fee would, by itself, amount to a significant burden for OUS.

However, we believe that the overall volume of the public records requests you have made of OUS is highly relevant to assessing the reasonableness of the decision not to waive the fee. As we have stated before, "[i]n previous Orders addressed to you, the Attorney General's Office has long viewed the overall volume of your public record's requests as relevant to assessing the burden of your requests." Public Records Order, February 26, 2009 (Harbaugh); *see also* Public Records Order, March 18, 2008 (Harbaugh) (citing previous Orders expressing the siginficance of the overall volume of public records requests to evaluting the resonableness of a fee-waiver decision).

OUS points out that you have made numerous requests for records from OUS this year alone. At times you have made two to three records requests a week. Some of those requests have been fairly simple, but others have been much more extensive and required significant staff time to fulfill. In the aggregate, responding to your records requests has caused OUS to expend a significant amount of time and resources. OUS notes that you always request a fee waiver, and states that granting those requests in every instance would be a signficant burden to OUS.

To be sure, the number of public records requests that you make does not deprive you of a right to inspect public records, and it does not necessarily mean that it will be reasonable to deny a fee-waiver request in every case. In fact, OUS has provided you records without charge on several occasions.

Considering the totality of the circumstances present, and particularly the total number of requests you have made, we cannot find that the $159 fee established by OUS presents an unreasonable impediment to the general public interest you have identified in this disclosure. We consequently deny your petition.

Sincerely,

Mary H Williams

MARY H. WILLIAMS
Deputy Attorney General

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c: Charles L. Triplett III, Secretary of the Board, OUS