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January 28, 2011

Lee van der Voo
1824 N Cramer St
Portland, OR 97217

Re: Petition for Fee Waiver:
Oregon Board of Dentistry

Dear Ms. van der Voo:

This letter is the Attorney General's order on your petition for review of the denial by the Oregon Dentistry Board (OBD) of your request for a fee waiver under the Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on January 10, 2011, makes two claims. First, you assert that OBD's fee estimate was not reasonably calculated. Second, you claim that OBD abused its discretion by denying your request for a complete fee waiver. We respectfully deny your petition for reasons discussed below.

Background

On September 20, 2010, we received a petition from you requesting disclosure of OBD's investigative files related to a 2010 complaint by employees alleging sexual conduct in the workplace by Dr. Terry Isom. On October 19, 2010, the Attorney General granted your petition in part and denied it in part:

> [W]e conclude that the records Ms. van der Voo requests are subject to disclosure to the extent they relate to allegations of sexual conduct in the workplace. We therefore grant her petition with respect to information related to such allegations, though we deny the petition with respect to a single witness letter. We order the Board to provide Ms. van der Voo with the remaining information in its 2010 file related to the allegations of inappropriate sexual conduct in the workplace, redacted to not disclose the identities of the complainants and witnesses. We deny Ms. van der Voo's petition insofar as it seeks information unrelated to the allegations of sexual conduct in the workplace.

Public Records Order, October 19, 2010, van der Voo.

On November 2, 2010, OBD sent you a letter stating that the redacted records were available to be released to you. The letter noted that OBD could assess a fee reasonably calculated to reimburse it for the actual cost of complying with the disclosure order under ORS 192.440(4). Attached to the letter was a statement of costs for providing the records, including $26.00 for copying costs, $25.00 for OBD staff time, $561.70 for redaction of the documents, and $2.41 for postage.

According to your January 10, 2011 petition—to which this order responds—you verbally requested a waiver of those fees on November 2, 2010, and Patrick Braatz, the Executive Director of OBD, denied that request. The next day you paid the fees and obtained the records. On November 4, 2010, you filed a petition claiming that OBD had unreasonably denied your request for a fee waiver. We spoke with Mr. Braatz, who stated that he was unable to grant or deny your fee-waiver request without guidance from the board. Because OBD was still willing to consider your fee-waiver request, we denied your November 4, 2010 petition as moot. In a December 29, 2010 letter, Mr. Braatz informed you that the OBD voted to deny your fee-waiver request. You appealed that denial in the petition at issue here.

Analysis

1. Reasonableness of OBD's fee estimate

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). At various points in your petition, you assert that OBD's fee is not reasonably calculated. 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 do not exist here; indeed the bulk of the fee represents an amount billed to OBD by the Department of Justice. Consequently, we do not further consider your arguments suggesting that the fees are unreasonably calculated.

2. OBD's refusal to waive its fee

The Public Records Law authorizes public bodies to waive or reduce their fees if "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). In our order regarding your request for OBD's file regarding its investigation of Dr. Isom, we concluded that—given the specific circumstances of the Isom investigation—part of the file was subject to disclosure in light of the public's

interest in knowing how OBD conducts its business. Public Records Order, October 19, 2010, Braatz and van der Voo. We conclude that the same public interest supports a fee waiver for the records that we ordered OBD to disclose.

Establishing that disclosure would serve the public interest authorizes a public body to grant a fee waiver or reduction. However, it does not necessarily require a public body to waive or reduce 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 v. OHSU, 199 Or App 160, 189 (2005). In exercising that discretion, "the public body's decision whether to grant or deny a fee waiver or reduction must be reasonable." *Id.* at 190. To determine whether OBD'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.

Notwithstanding its directive to consider all of the relevant circumstances, the Court of Appeals 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. The appropriate inquiry thus 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/] With those factors in mind, we now review the totality of the circumstances to determine whether OBD's decision exceeds the lawful options available to it under the Public Records Law.

We begin by recalling that our initial order partly granting your petition for disclosure identified "a generic public interest in disclosure [that] will exist in almost every case." We concluded that public interest required disclosure in the particular circumstances in light of the significantly diminished interests in confidentiality as the result of the amount of information about the case that already was publicly available. Public Records Order, October 19, 2010, Braatz and van der Voo at 4-5. Thus, we did not find an especially strong public interest in favor of disclosure; we merely found even weaker interests favoring confidentiality under the specific circumstances.

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

We next discuss whether OBD's records fee of $615.11 impedes the public interest in disclosure. We assume that a $615.11 fee generally presents some barrier to obtaining public records, and that it presented some barrier in this case. But we note that you were able to pay the fee and obtain the documents as soon as they were available.

The last factor we examine is the extent to which a fee waiver would burden OBD. In his letter dated December 29, 2010 denying your request for a fee waiver or reduction of costs, Patrick Braatz stressed the financial burden that waiver would impose on OBD.

We find none of the factors compelling. We cannot say under these circumstances that OBD's decision to deny your waiver request constituted an unreasonable exercise of discretion. As a result, we must respectfully deny your petition.

Sincerely,

DAVID E. LEITH
Associate Attorney General

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c: Patrick Braatz, Executive Director, Board of Denistry