ELLEN F. ROSENBLUM
ATTORNEY GENERAL

MARY H. WILLIAMS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4400

October 8, 2012

Laurie Bender
735 SW First Avenue, 2nd Floor
Portland, OR 97204
lbenderlaw@aol.com

Re: Petition for Public Records Disclosure Order:
Oregon State Police
DOJ File No. 257001-GA0072-12

Dear Ms. Bender,

This letter is the Attorney General's order in response to your petition dated September 23, 2012, seeking an order directing the Oregon State Police (OSP) to provide you with two categories of public records. You describe the records in question:

> [A]ll case numbers affected by Lab Deviation 031412-A and the supporting analytical casework for each case presumably showing either an inclusion or exclusion of the application of the reference or standard comparison, or CODIS hit evaluation or CODIS entry as a result of the application of the lower threshold [including] confirmation in each case where there was a retroactive application of the 100 RFU to the old STR data, prior to 2005, that this technical procedure was approved by the Technical Leader and/or Laboratory Director.
>
> * * *
>
> I am also requesting all correspondence (emails, memorandum, and communications) regarding the adoption of the Lab Deviation 031412-A.

With respect to the first category of records, you explain that you are "requesting the production of this information in a timely manner and at a cost that is not prohibitive." In other words, that aspect of your appeal takes issue with the fee and timing estimates OSP generated in response to your requests. For the reasons explained below, we respectfully deny your petition.

Oregon's Public Records Law, ORS 192.410 to 192.505, confers on "[e]very person * * * a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505." ORS 192.420(1). In providing access to public records, "[a] public body may 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). "The public is entitled to inspect nonexempt records as promptly as a public body reasonably can make them available." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2011) ("MANUAL") at 11.

Our office has long noted that we do not have general authority to review agency fees. MANUAL at 16; Public Records Order, March 29, 2000, Mayes. But "[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." MANUAL at 17.

We have spoken to OSP Lt. Susan Hormann regarding your petition. Lt. Hormann explains that your request will require OSP to review each file from the relevant time period in order to determine whether any documentation in the file indicates that the data was reassessed applying 100 RFU threshold to old STR data; this information is not centrally collected but exists only in the files themselves. Because of the scientific nature of this determination, Lt. Hormann explains that the review will need to be conducted by OSP personnel with qualifications that will enable the reviewer to recognize such documentation. *Cf. In Defense of Animals v. OHSU*, 199 Or App 160, 185-186 (2005) (OHSU could not require requester to pay OHSU professionals to perform redactions that consisted simply of the names of staff and of companies doing business with OHSU, as no specialized training was required to recognize those names). The hourly compensation rate for OSP personnel with the requisite qualifications is $55.71 per hour. OSP estimates that locating the relevant files and reviewing them will require approximately 45 minutes per file; OSP notes that this is an estimate, and the cost of fulfilling your request could change based on the actual time required. As originally phrased, your request would have required OSP to review 420 case files. In your petition and subsequent correspondence, you have indicated a willingness to narrow the request in a manner that would require OSP to review only 234 files.

We cannot conclude that these circumstances suggest that the true purpose of OSP's fee estimate is to constructively deny your request. Instead it appears that fulfilling your request will legitimately require OSP forensic scientists to expend a significant amount of time. We consequently deny your petition with respect to OSP's estimated fees.

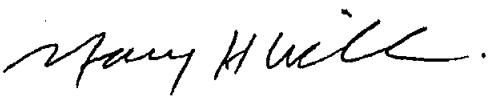
For related reasons, we cannot agree with your assertion that OSP's estimated timeframe for its response is inconsistent with its obligations under the Public Records Law. The individuals qualified to locate the documentation that you are seeking are OSP forensic scientists whose primary job duties entail important work on criminal investigatory matters. OSP anticipates that these professionals will be able to devote 4 hours per week to processing this request. As with OSP's fee estimate, this estimate is subject to change based on actual

circumstances. But we have no basis to determine in advance that OSP reasonably could do more without unduly compromising the ability of its forensic scientists to perform their core functions. Although the Court of Appeals has suggested that in some circumstances it may be appropriate for a public body to temporarily increase its workforce in order to process a Public Records Request, *In Defense of Animals*, 199 Or App at 186, OSP notes that your request requires the review of numerous criminal investigatory files, including open investigations, by personnel with the scientific knowledge to identify records responsive to your request. Under the circumstances, we do not think that the Public Records Law can be construed to require OSP to increase its workforce.

We turn to your request that we order OSP to provide you with "all correspondence * * * regarding the adoption of the Lab Deviation 031412-A." OSP informs us that, after searching for responsive documents, it has located, and will provide you with, two emails and minutes from two meetings mentioning that subject. OSP states that it does not have any additional records responsive to your request. We respectfully deny this portion of your petition as moot.

For the reasons stated above, your petition is respectfully denied.

Sincerely,



MARY H. WILLIAMS
Deputy Attorney General

MHW:bwl/JUSTICE-#3669266
c: Susan Hormann, OSP