ELLEN F. ROSENBLUM
ATTORNEY GENERAL

FREDERICK M. BOSS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

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

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VIA E-MAIL ONLY: rdavis@oregonian.com

VIA EMAIL ONLY: Ella.Maney@deq.state.or.us

Rob Davis
The Oregonian
1500 SW 1st Avenue, Suite 400
Portland, OR 97201

Ella Maney
Oregon Department of Environmental Quality
811 SW 6th Avenue
Portland, OR 97204

Re: Petition for Public Records Disclosure Order
Oregon Department of Environmental Quality
DOJ File No.: 340990-GA0091-16

Dear Mr. Davis and Ms. Maney:

This letter is the Attorney General's order responding to Mr. Davis's June 27, 2016, petition for a fee waiver under the Oregon Public Records Law, ORS 192.410 to 192.505.[1] Mr. Davis's petition asks the Attorney General to order the Department of Environmental Quality (DEQ) to waive the estimated fee of $300 to produce "the full case files for ORRCO . . . and American Petroleum Environmental Services [APES]."

Because of the strong public interest in these records related to potential pollution issues regarding Hayden Island, and considering the nature of the $120 retrieval fee, we conclude that it was unreasonable of DEQ to decline to waive that portion of its costs. We therefore grant Mr. Davis's petition with respect to that amount. However, we also conclude that, under the totality of the circumstances, DEQ acted reasonably in denying the portion of its fee that relates to staff time of its employees. We cannot conclude that either portion of the fee was calculated to constructively deny Mr. Davis's request, rather than to recoup DEQ's actual costs. We therefore grant Mr. Davis's petition, but only with respect to the portion of the remaining fee that is attributable to the cost to DEQ of having its contractor retrieve DEQ's files from contracted private storage.

[1] We thank Mr. Davis for agreeing to extend the deadline for issuing an order.

Background

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420(1). A public body may establish fees reasonably calculated to recover its actual cost in making public records available for inspection. The Attorney General has limited authority to review the reasonableness of a public body's fees:

> [T]here is no provision in the Public Records Law that authorizes a person to petition the Attorney General to review an agency's fees established under ORS 192.440(4) * * *. The 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 (2014) at 18-19.

The Public Records Law also authorizes a public body to waive its fees if doing so "is in the public interest because making the record available primarily benefits the general public." ORS 192.440(5). Even if waiving or reducing the fee is in the public interest, a public body has discretion whether or not to grant such a waiver or reduction. *In Defense of Animals v. OHSU*, 199 Or App 160, 189 (2005). But, examining the totality of the circumstances, "the public body's decision whether to grant or deny a fee waiver or reduction must be reasonable." *Id.* at 190. A person who believes that a state agency unreasonably denied a fee waiver request may petition the Attorney General to review the agency's decision. ORS 192.440(6).

That review typically looks at the following factors: (1) the character of the public interest in the particular disclosure; (2) the extent to which the fee impedes the public interest; and (3) the extent to which waiver or reduction would burden the public body. MANUAL at 23. Consistent with the guidance of the Oregon Court of Appeals in *In Defense of Animals*, however, we have acknowledged that this list of factors is not necessarily exclusive.

Mr. Davis's petition raises both issues. He asserts that the $300 DEQ is charging him is an unreasonable amount calculated to deny his request rather than recoup actual costs. And he argues that DEQ unreasonably refused to waive the fee.

In connection with Mr. Davis's petition, we have spoken with Nina DeConcini, DEQ's Northwest Division Administrator; Mimi Meador, Ms. DeConcini's executive assistant; and Ella Maney, DEQ's Records Coordinator. They told us that DEQ had waived $737.50 in fees for the 18.25 hours of staff time needed to gather, review, and produce 6,000+ e-mails responsive to other portions of Mr. Davis's request, but declined to waive $300 in fees to inspect DEQ's environmental-cleanup files for these companies. That $300 consists of $120 to retrieve six

boxes of off-site files from Iron Mountain, a private storage facility; and $180 for six hours of staff time to prepare six off-site boxes and three on-site boxes for Mr. Davis's review.

Review of DEQ's Fee

We start with Mr. Davis's argument that DEQ's fee is unreasonable. Specifically, Mr. Davis alleges that DEQ's division of the records request into two separate requests has unnecessarily increased DEQ's fees, that DEQ is impermissibly charging for staff time, and that the retrieval fee is unreasonable because it results from DEQ's decision to store its records with a private contractor rather than take advantage of the State Records Center run by the Archives Division of the Oregon Secretary of State's office (SOS Archives), which does not charge for document retrieval. We do not address the last of these contentions in detail, because we conclude that DEQ unreasonably refused to waive that portion of the fee.

We reiterate that our authority to review DEQ's fees is limited to assessing whether its true purpose is to deny the request rather than to recoup costs. In that context, the fact that DEQ waived more than $700 in fees associated with this request is highly relevant. Given that substantial waiver, it seems highly unlikely that DEQ intended the remaining fee to impede disclosure rather than recoup costs.

Moreover, many specific allegations made by Mr. Davis appear to be based on misunderstandings or miscommunications. For example, Ms. Maney told us that DEQ divided the request for case files into one request per company for administrative reasons, and that this division did not affect DEQ's fees. Specifically, portions of the request required retrieval of boxes from offsite storage while other portions did not, and DEQ split the request accordingly. Similarly, Mr. Davis's allegation that DEQ bills requesters more for retrieving boxes from storage than it is charged by its vendor is mistaken. In fact, DEQ will incur about $137.42 in costs, more than the $120 in fees that it quoted you.[2] Finally, we do not see any objective basis to believe that the staff time quoted by DEQ is calculated to deny the request rather than recoup DEQ's costs. It appears that this request entails 9 boxes worth of DEQ materials, and likely more. The Oregon Court of Appeals has suggested that "labor time" is appropriately included in fees established pursuant to the Oregon Public Records Law. *Davis v. Walker*, 108 Or App 128, 133 (1991). We cannot say that the amount of staff time charged by DEQ suggests that the true purpose of its fee was to deny Mr. Davis's request.

[2] The cost matrix that DEQ provided to Mr. Davis is confusing in this regard, but, properly understood, it is consistent with DEQ's explanation. It states that retrievals for public records requesters costs $60 for the first box and $12 for each additional box. It lists the costs for DEQ retrievals as "$4.06 to retrieve one box. $4.06 to refile one box. In addition to these charges, a base fee of $26.13 for next day delivery/pickup + $2.53 per cubic foot handling charge applies." Essentially, the listed amount charged to public records requesters accounts for a roundtrip. Retrieving a box costs it $4.06; delivery costs $26.13; pickup costs $26.13 and refiling costs $4.06. This total exceeds $60 even without accounting for the handling charge of $2.53 per cubic foot. The matrix is also confusing in that it incorrectly states that public records requesters are charged for document retrieval from the state records center, even though DEQ incurs no costs for that retrieval. However, Ms. Maney assures us that requesters are not charged for that retrieval.

Review of Denial of Fee Waiver

We turn to DEQ's refusal to waive $300 in fees. As noted above, ORS 192.440(5) authorizes DEQ waive its fees if doing so "is in the public interest because making the record available primarily benefits the general public." But the fact that waiver would serve the public interest does not necessarily mean that an agency is required to grant the waiver. A public body retains discretion whether or not to waive its fee, but it cannot "unreasonably" deny a waiver request.

DEQ does not dispute that making these records available will primarily benefit the general public, and we readily agree that the public interest threshold is met. Mr. Davis works for a major news organization that has the ability to analyze the requested records and then disseminate the results of that analysis to the public. The records in question relate to environmental cleanup, which is a matter of public interest. The records may also illuminate DEQ's regulatory oversight of possible polluters, a subject which has attracted significant public attention in recent months, and is a matter of public interest.

We therefore must assess whether DEQ acted unreasonably in denying the request to waive the remaining $300 in fees. In light of the nature of the document retrieval fee, we conclude that DEQ unreasonably denied Mr. Davis's waiver request. But we conclude that DEQ did not act unreasonably in denying his waiver request with respect to its staff costs.

As Mr. Davis notes in his petition, the retrieval fee charged by DEQ is entirely the product of DEQ's contractual agreement with a private vendor for offsite storage of DEQ files. Mr. Davis notes that the State Records Center is a publicly run, publicly funded resource available to agencies such as DEQ for records storage purposes, and that the State Records Center does not impose the document retrieval costs that DEQ's private vendor charges. Mr. Davis argues that by entering an agreement that includes these charges, DEQ effectively created a pay barrier to public access that would not exist had DEQ used the State Records Center.

We are neither authorized nor well-positioned to assess the overall wisdom of DEQ's decision to enter this agreement for storage of its records. On the whole, the agreement may be beneficial to DEQ and, by extension, to the state and taxpayers. And it would be extremely far-fetched to suggest that the overall purpose of that agreement is to impede public access to DEQ records. Nevertheless, when the public interest favors disclosure of records, DEQ's contract with its vendor creates a pay barrier that impedes that public interest. And Mr. Davis is correct that this particular barrier would not exist if DEQ's records were stored in the State Records Center. The question posed by this aspect of Mr. Davis's petition is whether it is reasonable for DEQ to pass an avoidable cost resulting from its contracting decisions along to a public records requester, in a case where the public interest would be served by disclosure of the records. We conclude that passing that cost along to Mr. Davis is not reasonable. Not only is the cost solely the result of DEQ's voluntary contractual arrangements, but absorbing the cost will not impose a

significant burden on DEQ. We therefore order DEQ to waive its costs associated with document retrieval.

With respect to the staff time, however, we cannot conclude that DEQ's decision was unreasonable under the totality of the circumstances. Unlike the retrieval costs, the time that DEQ staff will need to spend working on Mr. Davis's request is not an avoidable cost created by DEQ's contracting decisions. And when we take into consideration the fact that (including the retrieval fees discussed above) DEQ will have waived nearly $900 out of the $1037.50 in costs associated with Mr. Davis's requests, we find it impossible to conclude that DEQ's refusal to waive costs associated with this staff time is unreasonable under the totality of the circumstances.

Conclusion

We deny Mr. Davis's petition with respect to the $180 in staff time because DEQ's denial of fee waiver was not unreasonable under the totality of the circumstances and the true purpose of the fee was not to constructively deny access to public records. However, we find that DEQ unreasonably denied the petition with respect to the $120 in storage retrieval costs, and therefore order DEQ to waive $120 in fees. DEQ has seven days to comply with this order or to announce that it intends to institute court proceedings. ORS 192.450(2).

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:nog/DM7502230
c via email only: Nina DeConcini, DEQ