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October 18, 2016

VIA E-MAIL ONLY: kharden@portlandtribune.com

Kevin Harden
Portland Tribune/Pamplin Media Group

Re: Petition for Public Records Disclosure Order
Oregon Department of Transportation
DOJ File No.: 735001-GA0108-16

Dear Mr. Harden:

This letter is the Attorney General's order responding to your August 12, 2016, petition for a fee waiver under the Oregon Public Records Law, ORS 192.410 to 192.505. Thank you for agreeing to extend the deadline to issue an order. Your petition asks the Attorney General to order the Oregon Department of Transportation (ODOT) to waive its $126.52 fee to produce vehicle ownership records for all Volkswagen and Audi vehicles that have diesel engines, for model years 2009 to 2015.

ODOT denied your fee waiver request based on Article IX, section 3a(1) of the Oregon Constitution, which mandates that revenue from the Highway Fund be used only for specific purposes related to public highways and roads. ODOT has interpreted this mandate, based on prior public records orders and advice from this office, to prohibit it from spending Highway Fund revenue to fulfill public records requests. *See, e.g.*, Public Records Order, Mar 10, 2000, Suo, at 3–5. However, in a recent order we concluded that PERS was not prohibited from waiving public records fees despite being mandated to act only for the exclusive benefit of PERS members and beneficiaries. Public Records Order, Sept 12, 2016, Friedman.

In light of this recent order, we turn to the record before us to decide your petition. After examining that record, we respectfully deny your petition: ODOT has agreed to waive the $21.09 in overhead charges, making that portion of you petition moot; with respect to the remaining $105.43, ODOT's denial of your fee waiver request was not unreasonable under the totality of the circumstances, nor was the fee a constructive denial of your request.

Your petition shows that ODOT quoted you a cost estimate of $126.52 to produce 14,000 vehicle ownership records: that estimate included $16.60 for 20 minutes of DP Coordinator time at $50/hour, $88.83 for 81 seconds of DB2 CPU time at $65.73/minute, and $21.09 in overhead (calculated at 20% of ODOT's other costs). Your petition contests the charges for CPU time and DP Coordinator time, and asks that we require ODOT to provide the requested records to you at no charge.

Oregon's Public Records Law explicitly permits public bodies to "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 . . . to meet the person's request." ORS 192.440(4)(a); ORS 802.183(1) (specifically allowing ODOT to charge such fees). The Oregon Court of Appeals has suggested that "labor time" is appropriately included in these fees. *Davis v. Walker*, 108 Or App 128, 133 (1991) ("[I]t is reasonable to assume that the actual cost includes not just the materials to make photocopies but also the labor time to edit and copy the documents.").

Although the Attorney General has explicit authority to review a state agency's denial of a records request, ORS 192.450(1), and a state agency's denial of a request for fee waiver or reduction, ORS 192.440(6), there is no statute explicitly permitting Attorney General review of the reasonableness of a state agency's fees. However, we have interpreted the Attorney General's authority to enforce the inspection provisions of the public records law to allow an evaluation of 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 & Meetings Manual* 18–19 (2014).

To evaluate whether there was such a constructive denial here, we spoke with Craig Daniels, ODOT's DMV Records Section Manager, and Lana Tribbey, ODOT's Customer Services Group Manager. They explained the following:

- The DP Coordinator cost of $50/hour is calculated based on that employee's compensation.[1]
- The charge for DB2 CPU time covers the actual cost charged to ODOT to search for and generate the 14,000 vehicle ownership records; ODOT incurs this cost from the State Data Center (also known as ETS), which charges ODOT $65.73/minute to use the DB2 system.[2]
- ODOT will waive the $21.09 in overhead fees.

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[1] ODOT calculates compensation to include benefits ODOT pays for, as well as salary; given that ODOT actually pays for benefits, that fact does not suggest ODOT intended anything other than recovering its actual costs.

[2] ETS's rates are available at http://www.oregon.gov/das/OSCIO/Documents/ETS_Rates.pdf, which confirms the $65.73/minute rate for DB2 processing time. ODOT actually receives and pays an invoice for this CPU time.

ODOT has sufficiently explained how its fee was reasonably calculated to recover its actual cost to search for and compile the requested information, and there is no evidence here that ODOT deviated from its standard procedure in charging for this time. We therefore conclude that ODOT's fee was not a constructive denial of your records request.

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.

The reasonableness of a denial typically depends on 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. *Attorney General's Manual 23*.

Your petition does not address the public interest to be served here, but the purpose of obtaining these ownership records appears to be allowing you to contact Oregon VW owners about VW's recent settlement with consumers over the diesel emissions cheating scandal. Because you work for a news organization that has the ability to disseminate information gathered from consumer interviews to the general public, we conclude that disclosing these records to you will primarily benefit that public.

However, considering the totality of the circumstances, ODOT's denial was not unreasonable. The argument for fee waiver is strongest when disclosure will inform the public about the functioning of Oregon government. But the records here will not reveal anything about ODOT's operation, or the operation of any other state or local public body. Your request appears to be intended to help you contact Volkswagen and Audi owners to talk to them about the recent emissions scandal. In addition, the $105.43 fee likely will not impede your access to these records (and, in fact, you have already paid the fee and received the records).

Moreover, if ODOT's fee were waived, the costs of fulfilling your request would be paid from the Highway Fund. That fund is dedicated to "the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas." Or Const, Art IX, § 3a(1). The fund can also be expended on administrative costs. *Id.* § 3a(2)(a). As noted above, we recently concluded that PERS may expend statutorily dedicated Public Employees Retirement Fund (PERF) moneys in order to comply with the fee waiver and reduction provisions of the Oregon Public Records Law. In part, that decision was based on the explicit authority of PERS to use PERF moneys for administrative purposes. We also explained that the funding dedication applicable to PERS is not usually understood to excuse compliance with generally applicable laws (meaning laws that apply to dedicated funds on the same terms as other funds). We noted that transparency in public administration can be beneficial to government programs by discouraging misuse of funds and

other misconduct. We concluded that, in deciding whether to waive or reduce fees, PERS could consider the extent to which a particular request might provide these (or other) benefits to the administration of PERF. We assume that the same principles apply to ODOT. As noted above, it appears that this request is designed to make it simple for you to contact Volkswagen and Audi owners. There is nothing wrong with such a purpose. But the request will neither serve the purposes of the Highway Fund dedication in itself, nor encourage responsible public administration of the Highway Fund to realize those purposes. It will merely put you in contact with Volkswagen and Audi owners, for your own purposes. In light of that, and other factors just discussed, we cannot conclude that ODOT acted unreasonably in denying your waiver request.

Because ODOT's denial of your fee waiver request was neither a constructive denial of your records request, nor unreasonable under the totality of the circumstances, we respectfully deny the portion of your petition seeking waiver of $105.43; and because ODOT has now agreed to waive the $21.09 in overhead fees, we respectfully deny that portion of your petition as moot.

Sincerely,



Frederick M. Boss
Deputy Attorney General

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c via email only: Susan Chow, ODOT