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Brad Schmidt
The Oregonian
1500 SW 1st Ave, Suite 400
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Richard Riggs
Legal Administrator
Office of Child Care

Re: Petition for Public Records Fee Waiver:
Oregon Office of Child Care
DOJ File Nos.: 581060-GA0119-17 and 581070-GA0089-17

Dear Mr. Schmidt and Mr. Riggs:

This letter is the Attorney General's order responding to Mr. Schmidt's May 4, and August 1, 2017, petitions for a fee waiver under the Oregon Public Records Law, ORS 192.410 to 192.505.[1] The petitions ask the Attorney General to order the Office of Child Care (OCC) to waive certain fees to produce data regarding child care facilities.

The underlying public records request seeks ten years' worth of data concerning each of the 12,706 child care facilities regulated by OCC. The data is contained in a database maintained by the agency. This database contains 1,778 fields of potential data with respect to each of the regulated child care facilities. After OCC and Mr. Schmidt negotiated the scope of the request to reduce the number of fields requested, OCC agreed to provide all but 66 of those fields at no charge. OCC concluded that the remaining 66 fields allowed for narrative input and would require review for potentially exempt information. After conducting a time study, in which OCC

[1] This petition has been pending for some time. We thank Mr. Schmidt for his patience and courtesy.

employees processed data regarding several regulated facilities, OCC estimated that it would take 30 minutes to prepare the 66 fields of data regarding a single regulated entity for disclosure.[2] Mr. Schmidt then asked for specific cost estimates for each of the 66 fields based on the amount of data contained in them, hoping to focus his request on certain fields. OCC replied that generating estimates based on the amount of data actually in the fields would, in itself, require 24 hours of IT staff time at a cost of $1,440. It instead provided a rough estimate assuming that each field requires the same amount of time.

Mr. Schmidt's petition raises three arguments. First, he challenges the reasonableness of OCC's estimate that providing the 66 fields of data will require 30 minutes of work for each regulated facility. Second, to the extent that the time estimate is reasonable, he asks our office to order OCC to waive the associated fees. Finally, he asks that we order OCC to waive the $1,440 fee for providing field-specific estimates based on the amount of data actually present in each of the 66 fields requiring review. We deny the first two aspects of Mr. Schmidt's petition. But we grant his petition with regard to the $1,440 fee for generating more specific estimates.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. ORS 192.420(1). A public body may establish fees reasonably calculated to recover its actual cost in making public records available for inspection, but may waive or reduce its fee if doing so "is in the public interest because making the record available primarily benefits the general public." ORS 192.440(4)–(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.

This decision should usually be based 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 Public Records & Meetings Manual* 23 (2014). Any person denied a fee waiver or reduction by a state agency may petition the Attorney General to review that denial. ORS 192.440(6).

Public bodies cannot charge requesters a fee greater than $25 without first providing an estimated fee. ORS 192.440(4)(c). While the Attorney General does not generally have the authority to review the reasonableness of an estimate fee, a fee may be evaluated "where the

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[2] Because the database includes data on 12,706 entities, the total time reflected by this estimate is in excess of 6,000 hours. OCC stated that it would bill this time at a $25 per hour clerical rate, despite the fact that the statewide executive branch fee policy would authorize an hourly rate of $40 for work requiring specific knowledge of an agency program area or general awareness of agency-specific exemptions. *See* www.oregon.gov/das/Policies/107-001-030.pdf (statewide policy); www.oregon.gov/das/Docs/07-SSFS_PolicyQA.pdf (FAQ). These figures equate to an overall fee estimate of $158,825.

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." *Public Records Manual* 19.

Reasonableness of Overall Estimate

We are satisfied that OCC's estimate of 30 minutes to process 66 fields of data with respect to each regulated facility is reasonable. As noted above, OCC arrived at this figure after conducting a time study. And OCC's estimate entails reviewing more than two fields of data, and performing any redactions that are necessary, every minute. We see no basis to conclude that the purpose of this estimate is to deny the request.

Request for Waiver of Overall Costs

We turn to Mr. Schmidt's request that we order those costs waived. As explained above, public records fees can be reduced or waived when the requested disclosure is "in the public interest because making the record available primarily benefits the general public." ORS 192.440(5). Though reduction or waiver is not always required in that circumstance, a public body's decision must be reasonable under the totality of the circumstances. We assume that disclosing this information to Mr. Schmidt would primarily benefit the general public. Mr. Schmidt works for a major newspaper and has the ability to disseminate the data, and analysis of the data, to the public at large. And there undoubtedly is significant public interest in information about complaints against child care facilities, and in assessing how well OCC performs in regulating those facilities.

We nevertheless conclude that OCC's decision not to waive the entire fee is legally permissible based on the record currently before us. The primary basis for that conclusion is the sheer breadth of the request and the resulting burden faced by OCC. At this point we are not persuaded that the strong public interest in monitoring OCC's regulation of child care facilities necessarily justifies spending public resources to satisfy Mr. Schmidt's comprehensive request in its entirety. Indeed, Mr. Schmidt's interest in obtaining more specific cost estimates for various fields effectively acknowledges that it may be possible to obtain the most pertinent information in a more cost-effective way. Comprehensiveness for its own sake would certainly serve a public interest, but we cannot say that particular interest is an especially compelling one compared to the amount of public resources that comprehensive disclosure would require in this case. Moreover, OCC's decision to charge $25 per hour for the work already appears to reflect a significant reduction of the overall fee.

Fee estimate for providing an individualized cost estimate

For many public records requests, providing an individualized fee estimate requires only an incidental amount of time. That is, an agency might incur costs in locating responsive records, but once the records are located it is typically not time consuming to determine an

estimated fee. Here, however, OCC states that determining the amount of data in each of the 66 fields, and tailoring its estimate to account for differences between the fields, will require 24 hours of work by its IT staff.

However, OCC has already agreed to waive its fee to export the 66 fields into an Excel compatible format. Once this is done, OCC should be able to use Excel to calculate the number of characters in each field.[3] This will allow OCC to gauge the relative amount of data across the 66 fields, and to use the $158k fee estimate to then provide more individualized estimates for each field.

When we consider the overall estimate quoted by OCC and the difficulty of meaningfully focusing the request in the absence of more specific cost information, the $1,440 fee constitutes too much of an impediment to public disclosure. Mr. Schmidt's lack of access to this information significantly diminishes his ability to tailor his request for this information in a way that efficiently serves the public interest. In addition, as it has been explained to us, the effort required to generate this estimate is largely the result of data storage choices made by OCC. We are in no way criticizing those choices, which may make sense for any number of reasons unrelated to this petition. But under the circumstances, we conclude this portion of the resulting expense should be borne by OCC, not by Mr. Schmidt. *See* Public Records Order, July 8, 2016, Davis (considering agency storage choices in determining whether the denial of fee waiver was reasonable).

Based on these factors, we conclude that producing more individualized fee estimates for each of the 66 fields is in the public interest, and that OCC's decision not to waive the fee unreasonably impedes that interest.

Conclusion

In summary, we deny Mr. Schmidt's petition to the extent it relates to the overall estimate provided by OCC. But we grant his petition to the extent it seeks a waiver of the $1,440 fee to provide more individualized fee estimates for each of the 66 fields. OCC has seven days to decide to waive the $1,440 fee, or to send to Mr. Schmidt (with a copy to the Attorney General) notice of its intent to institute proceedings for injunctive or declaratory relief. *See* ORS 192.450(2).

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn:nog/DM8502976

[3] Excel's LEN function allows a user to calculate the number of characters in any cell, and the SUM function allows a user to calculate the sum of all these character counts for a given field (column).