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

August 14, 2018

VIA E-MAIL ONLY: davebahr@mindspring.com

Deschutes River Alliance
c/o Dave Bahr
Bahr Law Offices, P.C.
1035 ½ Monroe Street
Eugene, OR 97402

Re: Petition for Public Records Fee Waiver
Oregon Department of Fish and Wildlife
DOJ File No.: 635020-GA0046-18

Dear Mr. Bahr:

This letter is the Attorney General's response to your July 26, 2018 petition, on behalf of the Deschutes River Alliance (DRA), under the Oregon Public Records Law, ORS 192.311 to 192.431.[1] Your petition asks the Attorney General to order the Oregon Department of Fish and Wildlife (ODFW) to waive its fees to produce data and reports relating to certain fish runs in the Deschutes River. For the reasons discussed below, we respectfully deny your petition.

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 192.314(1). Agencies may establish fees reasonably calculated to recover actual costs in making public records available, but "may furnish copies without charge or a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public." ORS 192.324(4)–(5). Even if waiving or reducing the fee is in the public interest, agencies have discretion whether or not to grant such waivers or reductions. *See In Defense of Animals*, 199 Or App 160, 189 (2005). An agency's decision to deny a fee waiver or reduction must be reasonable under the totality of the circumstances. *Id.* at 190.

Any person denied a fee waiver or reduction by a state agency may petition the Attorney General for review. ORS 192.324(6). The Attorney General does not generally have the

[1] Thank you for granting an extension to the deadline to issue this order.

authority to review the reasonableness of a fee estimate, or to determine whether an estimate accurately reflects the actual cost to the agency of disclosing public records. *Attorney General's Public Records & Meetings Manual* 16-19 (2014) (*Manual*); *see also* Public Records Order, Sept 11, 2009, Wright; and Public Records Order, Mar 29, 2000, Mayes. However, the Attorney General may evaluate claims that "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 19.

DRA submitted two public records requests to ODFW, on April 24 and April 25, 2018, encompassing 14 broad categories of data and reports over a 31-year period (1977-2017). DRA also requested a waiver of all fees. In support of its fee waiver request, DRA highlighted its role as an advocate for the health of the Deschutes River, the need to inform the public about the potential impacts of the Pelton Round Butte Hydroelectric Project Selective Water Withdrawal (SWW) tower upon the health of the Deschutes River, and DRA's ability to disseminate the requested information to its members and the public. DRA also noted that it has no financial interest in the requested information and that it is not aware of any public domain source of the specific data it requested.

On June 19, 2018, ODFW responded with a fee estimate of $770.00 based upon 28 hours of staff time at $28/hour (first half hour waived). ODFW indicated it was unable to waive its fee because of "the extreme budgetary constraints on state agencies." ODFW also indicated it was willing to work with DRA to refine or narrow its request in order to reduce the fee.

Your petition challenges the denial of DRA's request for a fee waiver and raises a number of arguments. First, you argue the magnitude of the fee constructively denies DRA's request. In response to this claim, ODFW informs us that it will take approximately 30 minutes per item to produce the eight items that are available in electronic format (items 2, 3, 4, 7, 8, 9, 13 and 14), with a combined fee estimate of $98.00 (first half hour waived). ODFW indicates the remaining items, which consist of both paper and electronic records, will take approximately 24 hours to assemble, review, copy/scan, and re-file, with a combined fee estimate of $672.00.

Under the circumstances – which include the broad scope of the request, ODFW's ability to describe the effort required to respond to the request, and ODFW's willingness to work with DRA to limit the scope of the request to reduce the fee – we cannot conclude the estimated fee is grossly excessive or that its primary purpose is to constructively deny DRA's request. Moreover, although DRA is a non-profit organization with a modest number of members, we have no reason to believe DRA lacks the financial resources to pay the fee.[2] Finally, we note that ODFW is obligated to refund the difference if the estimate proves too high. Thus, we must deny this aspect of your petition.

[2] In this regard, we note that DRA is currently the plaintiff in a multi-year federal lawsuit against Portland General Electric that is at least indirectly related to the subject of these public records requests. This suggests DRA has the resources to pay ODFW for the actual costs of producing the requested information. *See* Public Records Order, Sept 10, 2009, Rogers/Fletcher.

You also contend the $770.00 fee is not reasonably calculated to reimburse ODFW for its actual costs and is therefore unlawful. We must deny this aspect of your petition because, as noted above, the Attorney General lacks jurisdiction to assess the reasonableness of fees or to determine whether a fee estimate accurately reflects an agency's actual costs. *See Manual* at 19. Given our inferior knowledge of ODFW's records and systems, we are not in a position to second-guess the reasonableness of ODFW's fee estimate.

Finally, you assert that ODFW's fee waiver denial was unlawful because (1) ODFW failed to disprove DRA's *prima facie* case in favor of a fee waiver that disclosure would primarily benefit the general public, and (2) ODFW abused its discretion in denying the fee waiver request by relying upon a single factor, rather than considering all relevant circumstances. Both arguments raise procedural issues. But our role here, as explained by the Oregon Court of Appeals, is to determine whether ODFW abused its discretion considering the totality of the circumstances. *See In Defense of Animals*, 199 Or App 190. That is not a procedural question.

Accordingly, we turn to your substantive argument that ODFW abused its discretion in denying the fee waiver request. As the Oregon Court of Appeals has noted, "It is significant … that, even 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." *Id.* at 189. However, a public body must exercise this discretion reasonably under the circumstances. *Id.* at 190. In applying this standard, we do not decide whether the Attorney General would have made the same decision under the circumstances, but rather whether the agency's decision was consistent with its range of lawful options. *See* Public Records Order, Aug 4, 2015, Davis; and Public Records Order, Sept 10, 2009, Rogers/Fletcher. We have determined that, in exercising its discretion, an agency should ordinarily consider (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. *See Manual* at 23.

Here, there is a legitimate public interest in the information DRA requested because the effects of the SWW tower upon the health of the Deschutes River could negatively impact the region's economic and recreational potential. Importantly, ODFW acknowledges this public interest and notes that its denial of DRA's fee waiver request was not based on a determination that a fee waiver was not in the public interest. With respect to the character of this public interest, we are not aware of any broad or heightened interest among the general public for the information DRA has requested. This suggests only a modest degree of interest among the general public.

In considering the extent to which the fee impedes the public interest, the requester's ability to pay is relevant. *See* Public Records Order, Sept 10, 2009, Rogers/Fletcher. As noted above, we have no reason to believe DRA lacks the financial resources to pay the fee. Moreover, the amount of the fee appears reasonable in relation to the large volume of information DRA has requested. Finally, we note that ODFW publishes a significant amount of information on its website, including information similar to that requested by DRA, regarding the health of the

Deschutes River. Under the circumstances, we cannot conclude the ODFW's fee estimate impedes the public interest in disclosure.

In assessing the burden on public bodies, we consider, among other things, the extent of time, expense, and interference with the business of the public body. *See Manual* at 23. ODFW indicates waiving its fee for 28 hours of staff time will constitute a significant burden. Considering the information already published by ODFW, the agency's willingness to work with DRA to potentially reduce the cost by focusing the request, and DRA's likely ability to pay, we cannot say that ODFW's refusal to waive its fee was unreasonable.

For the foregoing reasons, we respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM9096618
c via email only: Michelle, Tate, ODFW