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December 20, 2018

VIA E-MAIL ONLY: foia@biologicaldiversity.org

Center for Biological Diversity
c/o Margaret Townsend
P.O. Box 11374
Portland, OR 97211-0374

Re: Petition for Public Records Fee Waiver
Oregon Department of Fish and Wildlife
DOJ File No.: 635010-GA0068-18

Dear Ms. Townsend:

This letter is the Attorney General's response to your December 11, 2018 petition, on behalf of the Center for Biological Diversity (the "Center"), 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 certain records. 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 v. OHSU*, 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 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*

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

Public Records and Meetings Manual at 16-19 (2014) ("*Manual*"); *see also* Public Records Order, Bahr, Aug 14, 2018; Public Records Order, Sept 11, 2009, Wright. 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.

Your petition stems from a public records request the Center originally submitted to ODFW on June 7, 2018. That request sought a broad range of plans, reports, records and correspondence relating to ODFW's management of black bear and cougar populations over a 2.5 year period. The Center also requested a waiver of all fees associated with its request, explaining that disclosing the records would primarily benefit the general public.

On August 16, 2018, ODFW denied the Center's request for a fee waiver and provided a fee estimate of $16,751.00. In calculating its fee, ODFW estimated that it would take nearly 600 hours to locate and review the responsive records. ODFW acknowledged that the Center qualified for a public interest fee waiver under ORS 192.324(5). However, it explained that it was exercising its discretion to deny the fee waiver because processing the request would place a substantial burden on agency resources. ODFW also indicated it was willing to work with the Center to narrow the scope of the request in order to reduce the cost.

In response to ODFW's initial fee estimate, the Center submitted a narrower request on September 6, 2018, in which it seeks:

1. Copies of the State Fish and Wildlife Commission's current black bear cougar management plans.

2. The rules and guidance that set the "process and criteria for selecting and training persons to act as agents" under ORS 498.164(3).

3. Reports on the appointment and use of agents prepared pursuant to ORS 498.164(6).

4. Copies of agent appointment letters issued pursuant to ORS 498.164(2) generated over the previous year.

5. Records from January 1, 2017 to the present reflecting "consideration(s) of the legality or illegality of using bait or dogs to target black bears or cougar, including but not limited to changes considered or made to the program to bring it into compliance with the law."

6. Records or communications from January 1, 2017 to the present referencing "the use of bait or dogs to target bears between ODFW and any owner, lessee, or representative of any commercial timber property."

ODFW responded on November 6, 2018 with a reduced fee estimate of $5,706.50. Once again, ODFW acknowledged that the Center qualified for a public interest fee waiver, but

explained that it was exercising its discretion to deny the waiver. In reaching this decision, ODFW concluded that responding to the request would require substantial resources – including nearly 200 hours of staff time – such that a waiver of fees would cause an unreasonable burden on the agency.

Your petition appeals ODFW's decision to deny your request for a fee waiver. You argue that ODFW's decision was improper, that the fee estimate makes access to the requested records cost prohibitive for the public, and that the effect of the fee is to constructively deny the Center's request. Accordingly, you ask this office to order ODFW to grant the Center's request for a fee waiver.

We contacted Derek Broman, ODFW's Carnivore-Furbearer Coordinator, who provided several updates related to your petition. First, he noted that ODFW completed its response to the first part of your request at no charge. He also explained that ODFW will respond to the third part of the Center's request at no charge.[2] Finally, in light of your petition ODFW provided the Center with an updated fee estimate of $3,269.50 on December 18, 2018 (most of that estimate, nearly $2,800.00, is the cost to process just the last two parts of the Center's request).

We now examine your claim that ODFW improperly denied your request for a fee waiver in light of these updates. First, we note that even if an agency determines that a requester meets the public interest test under ORS 192.324(5), the agency is not required to grant a fee waiver. *See In Defense of Animals* at 189. Rather, agencies have discretion whether to grant a waiver in a particular instance. However, agencies must exercise this discretion reasonably under the circumstances. *Id.* at 190. In exercising its discretion, we have determined that agencies 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, ODFW has consistently acknowledged that there is a legitimate public interest in the records the Center requested. However, with respect to the character of this public interest, we are not aware of any broad or heightened interest in this topic among the general public.

Next, the requester's ability to pay is relevant to determining the extent to which the fee impedes the public interest. *See* Public Records Order, Aug 14, 2018, Bahr; Public Records Order, Sept 10, 2009, Rogers/Fletcher. Although the Center is a non-profit organization, we have no reason to believe it lacks the financial resources to pay the fee.[3] And we note that ODFW is obligated to refund the difference if the estimate proves too high. As discussed more fully below, the amount of the fee also appears reasonable in relation to the large volume of

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[2] ODFW initially provided you with a $1,344.00 fee estimate for this part of the Center's request. This was based upon the agency's belief that you were seeking all reports used to compile the biennial report required by ORS 498.164(6). In light of your petition, ODFW acknowledges it overlooked the clarification you provided on September 6, 2018 in which you indicated you were only seeking the biennial report. In light of this clarification, ODFW indicates it will be able to provide the report without charge.

[3] On this point, we note that the Center's website announces that the Center has sued the Trump Administration 103 times. This suggests DRA has the resources to pay ODFW for the actual costs of producing the requested information. *See* Public Records Order, Aug 14, 2018, Bahr; Public Records Order, Sept 10, 2009, Rogers/Fletcher.

records ODFW will need to review to respond to your request. Under the circumstances, we cannot conclude that ODFW's fee estimate impedes the public interest in disclosure.

Finally, relevant factors in assessing the burden on public bodies include the extent of time, expense and interference with agency business; the volume of the records requested; and the extent to which an inspection of the records is "insufficient for the public interest or for the particular needs of the requester." *Manual* at 23. ODFW indicates that waiving its fee would constitute a substantial burden to the agency, to include more than 110 hours of unreimbursed staff time. This is particularly true with respect to the last two parts of your request, which ODFW estimates will cost nearly $2,800 to process. For example, a preliminary search of just one ODFW employee's e-mail for "dogs," "hounds," "bait" or "black bears" revealed several thousand records. As a practical matter, the only way to determine which e-mails are responsive – that is, to determine whether they relate to "the legality or illegality of using bait or dogs to target black bears or cougar," or "changes considered or made to the program," or communications with any unspecified "owner, lessee, or representative of any commercial timber property" – is for someone to conduct a time-consuming review of each e-mail.

We have noted previously that responding to such broad requests often causes agencies to spend considerable time reviewing records that bear no relation to the interests of either the requester or the general public. *See, e.g.,* Public Records Order, Aug 31, 2018, Volin; Public Records Order, June 11, 2018, Schulberg. The burden on agencies can be immense in comparison to requests that are narrowly focused upon specific records (such as those portions of the Center's request that ODFW is completing at no charge). Moreover, in such cases the public interest in disclosure may be diminished to the point where it cannot justify the additional burden agencies would incur if ordered to waive their fees. *Id.*; *Manual* at 23.

In this case, we cannot conclude the public interest in disclosure justifies the substantial burden ODFW would incur if we ordered it to waive its fees. And we cannot conclude that ODFW's denial was otherwise unreasonable or that the purpose of the fee estimate was to constructively deny your request. We therefore respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn:nog/DM9339882
c via email only: Derek Broman, ODFW