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January 21, 2020

VIA EMAIL ONLY: ak@alankesslerlaw.com

Alan Kessler
No More Freeways PDX
2725 SE 36th Ave
Portland, Oregon 97202

Re: Petition for Public Records Disclosure Order
Oregon Department of Transportation
DOJ File No. 734610-GA0005-20

Dear Mr. Kessler:

This letter is the Attorney General's response to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition asks the Attorney General to order the Oregon Department of Transportation (ODOT) to produce all emails sent or received by Megan Channell, ODOT Rose Quarter Project Director, from November 20, 2019 to December 3, 2019. For the following reasons, we respectfully deny your petition.

The Public Records Law confers the right to inspect public records in Oregon, unless such records are exempt under ORS 192.338, 192.345, or 192.355. ORS 192.314(1). The law is a disclosure law, and agencies are obligated to respond to records requests "as soon as practicable and without unreasonable delay." ORS 192.329(1). An agency that is unable to complete its response within fifteen business days of receiving a written request is required to provide a written statement that the public body is still processing the request and provide a reasonable estimated completion date. ORS 192.329(5). A requester may seek review by the Attorney General if they believe an agency has failed to comply with the response timelines contained in ORS 192.329. ORS 192.407(1). An agency's failure to provide a timely response required by ORS 192.329 shall be treated as a denial of the request, unless the agency can demonstrate that compliance was not required under ORS 192.329. ORS 192.407(1)(a). The agency carries the burden to sustain its actions. ORS 192.411(1). Finally, an agency may establish fees reasonably calculated to recover actual costs in making public records available, and its obligation to process a request a request is suspended until the fee has been paid or waived. *See* ORS 192.324(4) and 192.329(3)(a).

Your petition explains that you requested Ms. Channell's emails on December 4, 2019 and that ODOT acknowledged the request on December 11, 2019. Thereafter, ODOT gave you two updates – on December 18 and December 30 – indicating that it was preparing a fee estimate. On January 3, 2020, ODOT provided you with a fee estimate of $3,750.00, reflecting ODOT's estimate that it will take 60 hours to review more than 920 responsive emails. ODOT also informed you at that time that it would take approximately 20-25 business days to process your request upon receipt of payment. Your petition followed. First, you ask us to order ODOT to disclose the emails because ODOT failed to complete its response to you or to provide you with an estimated completion date within fifteen business days, as required by ORS 192.329(5). You also argue that ODOT's obligation to process your request in a timely manner was not suspended by ODOT's fee estimate because you do not believe the estimate was reasonably calculated to recover ODOT's actual costs. And because you do not believe ODOT's obligation to respond to you request has been suspended, you contend that ODOT has failed to complete its response to you as soon as practicable and without unreasonable delay. Alternatively, you argue the true purpose of ODOT's fee estimate was to constructively deny your request.

In response to your petition, we contacted Ms. Channell, and Laura Rojas, ODOT Public Records Requests Coordinator. They explained that the fee estimate was based primarily upon the assumption that Ms. Channell would have to conduct the initial review of her own emails, in part because she does not have any administrative staff to perform such a review. Under ODOT's fee policy, which incorporates the *Department of Administrative Services Statewide Policy on Public Records Request Fees and Charges* (Feb 15, 2017) ("*DAS Policy on Fees*"), Ms. Channell's time is generally chargeable at the "Professional" rate of $75 per hour. They also estimated it would take Ms. Channell 3-4 minutes to review each email, including attachments, for potentially exempt information. But they stressed that this was a "rough guess" because they have no experience reviewing such a large volume of emails. They also acknowledged that ODOT must refund the difference if the estimate proves too high. Finally, after discussing with us the assumptions they used in calculating the fee estimate, ODOT understands that there may be ways to process your request more quickly and at less cost.[1] Therefore, ODOT has agreed to recalculate the fee estimate and will provide the new estimate to you soon.

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[1] For example, the *DAS Policy on Fees* states:

> The hourly rate charged for additional staff time will be based on the level of skill or expertise required to complete the work performed. Meaning, if work done to fulfill a request requires clerical-level skills, agencies may only charge the clerical hourly rate [for] time spent on that portion of the work (as a maximum), even if a managerial-level or professional-level employee actually fulfills the request on behalf of the agency.

(emphasis in original). Thus, to the extent Ms. Channell's review requires only clerical-level skill, it should be charged at the clerical hourly rate.

Turning to your first argument, the record demonstrates that ODOT failed to complete its response or to provide you with an estimated completion date within fifteen business days of your request, as required by ORS 192.329. ORS 192.407(3) provides that when an agency fails to comply with ORS 192.329, we have discretion to order the disclosure of nonexempt material within any timeframe we deem appropriate to bring the agency into compliance with ORS 192.329.[2] Under the circumstances, we decline to order disclosure within a particular timeframe because the timeframe proposed by ODOT (i.e., 20 to 25 business days after receipt of payment) seems to comply with the law based on the information currently available. *See* ORS 192.329(5)(b).

We now turn to your argument that ODOT's fee estimate did not suspend its obligation to process your request. In short, because you do not believe ODOT's fee is reasonably calculated to recapture its actual costs, you argue that it is not "a fee permitted under ORS 192.324(4)" for purposes of suspending ODOT's obligation to process your request under ORS 192.329(3)(a). However, it has long been our position that the Attorney General does not have authority to review the reasonableness of a fee estimate or to determine whether an estimate accurately reflects an agency's actual cost of disclosing public records. *See Attorney General's Public Records and Meetings Manual* 22 (2019) (*Manual*); *see also* Public Records Order, Aug 14, 2018, Bahr (citations omitted). We are therefore unable to evaluate your claim because such an evaluation would necessarily require us to determine whether ODOT's fee estimate accurately reflects its actual costs. Under the circumstances, we conclude that ODOT is not required to begin processing your request until either you pay the fee estimate or the fee is waived.

We may evaluate your alternative claim that the amount of the ODOT's fee estimate in comparison to the nature of your request suggests that the true purpose of the fee was to constructively deny your request. *See Manual* at 22. Under the circumstances, however, we cannot conclude that the true purpose for ODOT's fee estimate was to constructively deny your request. Ms. Channel and Ms. Rojas were able to describe the assumptions and processes used to calculate the fee estimate. Their explanation appears reasonable given the large volume of records to be reviewed, their limited experience processing such requests, and their reliance upon ODOT's fee policy. Moreover, nothing in the record or in our conversations with ODOT causes us to suspect that ODOT's fees were imposed in bad faith to prevent you from accessing the records. Rather, ODOT acknowledged that it must refund any excess fees and it was receptive to feedback on how to reduce its actual costs. We therefore deny this aspect of your petition.

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[2] We also note that if the Attorney General grants a petition under ORS 192.407, the order granting the petition may require the agency to pay a penalty of $200.00 to the requester, or waive or reduce its fee, if the agency responded to the request with undue delay or otherwise failed to respond to the request. ORS 192.407(3)(c), *as amended by* House Bill 2353 (2019). You have not asked us to impose a $200 penalty or to order ODOT to waive or reduce its fee in this instance. And on the available record, we do not believe either measure is warranted at this time.

For the reasons discussed above, we cannot conclude that ODOT has failed to complete its response in a timely manner or that it has otherwise constructively denied your request. We therefore respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM10058359
c via email only: Megan Channell, ODOT