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May 22, 2020

VIA E-MAIL ONLY: sllvolin@gmail.com

Stephanie Volin
29 South Valley Road
West Orange, NJ 07052

Re: Petition for Public Records Fee Waiver
Oregon State Bar
DOJ File No.: 993001-GA0047-20

Dear Ms. Volin:

This letter is the Attorney General's response to a petition filed by you on May 12, 2020 under the Oregon Public Records Law, ORS 192.311 to 192.431.[1] Your petition asks the Attorney General to order the Oregon State Bar (OSB) to waive or significantly reduce its fees to disclose the disciplinary case file of disbarred attorney Jeffrey Dickey. 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 their actual costs for making public records available, but "may furnish copies without charge or at 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). The furnishing of public records primarily benefits the general public when its greatest utility is to the community or society as a whole. *See In Defense of Animals*, 199 Or App 160, 189 (2005). Even if waiving or reducing the fee is in the public interest, agencies have discretion whether or not to grant such waivers or reductions. 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 who believes there has been an unreasonable denial fee waiver or reduction by a state agency may petition the Attorney General for review. ORS 192.324(6).

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

In response to your request for Mr. Dickey's disciplinary file, OSB provided you with a fee estimate of $139.47 to make the records available. You requested OSB waive or reduce the fee because you believe disclosure to you is in the public's interest. OSB denied your fee waiver request and your petition followed. Your petition explains that you have paid the fee estimate, but that you believe the fee was unreasonable and calculated to deny your access to these records. Your claim is based upon your belief that OSB personnel have developed a strong animosity toward you due to your efforts to expose corruption within the organization. You also assert that OSB unreasonably denied your request for a fee waiver and describe why you believe you are entitled to a public interest fee waiver under ORS 192.324(5). Specifically, you publish on the website Medium and claim to have a large readership focused narrowly on matters of the OSB, law, ethics, and the judiciary. You believe OSB has mishandled several attorney misconduct cases, including Mr. Dickey's 2016 disbarment case, due to what you describe as corruption and misconduct by OSB leadership. You claim there is considerable public concern regarding OSB's handling of these cases, and that it is important that you be able to access these records because you are the only person investigating and writing about these matters. Your petition suggests that under these circumstances, OSB is obligated to waive or significantly reduce its fees.

We contacted OSB General Counsel Amber Hollister regarding your petition. She denied your contention that the true purpose of OSB's fee estimate was to deny your access to the records. She explained OSB's position that the estimate was reasonably calculated to recover the actual costs of processing your request, and that OSB informed you that it would refund any excess fees. She noted that by their nature such estimates are not perfect, but that OSB calculated this estimate in good faith and with the understanding that actual costs may vary. She explained that the $139.47 fee was based on OSB's estimate that it would take approximately 1.75 hours to locate, retrieve and review roughly 300 pages of responsive material. She also explained that attorney disciplinary files often include sensitive personal, financial, and health information about complainants and witnesses, which necessitates a detailed review for material that is exempt from public disclosure.

As we have long observed, there is no provision in the Pubic Records Law authorizing a person to petition the Attorney General to review the reasonableness of an agency's fee. *See Attorney General's Public Records and Meetings Manual* at 22 ("*Manual"*). However, our authority to enforce the inspection provisions of the law may require us to determine whether 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 recover the agency's actual costs. *Id*. In this instance, OSB has sufficiently described how its fee was reasonably calculated to recover its actual costs and the total amount of the estimate does not seem disproportionate to the scope of your request. Moreover, there is no evidence that OSB deviated from its standard procedures for calculating its fees in this instance and OSB acknowledged that it will refund the difference if the estimate proves too high. Under the circumstances, nothing suggests to us that the true purpose of OSB's fee estimate was to constructively deny your requests. We therefore deny this aspect of your petition.

Regarding OSB's denial of your fee waiver request, Ms. Hollister reiterated OSB's position, as stated in response to petitions previously filed by you, that you are not eligible for a public interest fee waiver under ORS 192.324(5). *See* Public Records Order, Aug 31, 2019, Volin; and Public Records Order, Nov 22, 2019, Volin. Specifically, OSB has determined that disclosure to you will not primarily benefit the general public because your blog on Medium is not an effective tool for disseminating information to the general public. As support for OSB's determination, Ms. Hollister observed that your blog has only 191 followers nationally, that the Medium platform has no journalistic standards or requirement that contributors be credentialed journalists, and that your stories have not generated any additional media coverage or inquiries to OSB. And again, she highlighted your strong private interests in obtaining records from OSB generally, evidenced by your threats to sue OSB and your past involvement in related civil cases. *See id.*

Next, Ms. Hollister explained that even if disclosure to you would primarily benefit the general public, OSB would exercise its discretion to deny your fee waiver request in this instance. She informed us that according OSB's logs, you have submitted 119 public records requests to OSB since June 2018, including six pending requests. She indicated that the volume and pace of your requests far exceeds anything OSB has received from a single requester in OSB's history. She further explained that the actual costs associated with processing all of your requests to date – to include many you elected not to pursue – are far greater than the fees that OSB has collected from you. Finally, she noted that processing the request at issue here will require more than a modest expenditure of time and staff resources, including, as noted above, a detailed records review to identify and redact sensitive complainant information.

Because Ms. Hollister has indicated that OSB would exercise its discretion to deny your fee waiver request, we do not need to address the threshold issue of whether you are eligible for a public interest fee waiver under ORS 192.324(5). Instead, we evaluate whether OSB's fee waiver denial was reasonable under the totality of the circumstances. As we have observed, when making a fee waiver decision, agencies should consider the character of the public interest in the particular records, the extent to which the agency's fee impedes that public interest, and the extent to which a waiver would burden the public body. *See Manual* at 24. Relevant factors include how narrowly tailored the request is to a matter of public interest; the time and expense needed to fulfill the request; the volume of the records requested; the need to redact exempt material; whether the fee was avoidable; the requester's ability to pay the fee; and the aggregate effect of numerous public records requests upon the agency. *Id.* at 25.

On balance, our evaluation of these factors leads us to conclude that OSB's refusal to waive its fee in this instance was not unreasonable. First, we perceive only modest interest among the general public in your investigative efforts. As you note, you appear to be the only person who is investigating suspected corruption within OSB, and the lack of similar inquiries to OSB appears to corroborate your claim. Moreover, we have not been able to discern any

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heightened interest among the general public in Mr. Dickey's 2016 disbarment case.[2] In contrast, the nature, volume, frequency and aggregate effect of your numerous requests has caused OSB to expend significant time and resources for which, Ms. Hollister reports, the actual costs greatly exceed what OSB has sought to recover from you. Under the circumstances, we do not think the modest public interest in the records you have requested in this instance justifies the additional burden OSB would incur if we order it to waive its fee in this instance.[3]

For the foregoing reasons, we conclude that OSB's fee was not a constructive denial of your request and that OSB did not unreasonably deny your request for a fee waiver. We therefore respectfully deny your petition.

Sincerely,



Frederick M. Boss
Deputy Attorney General

FMB:pjn/DM10248951
c via email only: Amber Hollister, OSB

[2] In this regard, we distinguish between what we perceive to be the modest public interest in your suspicions of corruption within OSB, and the interest the general public may have in learning about Mr. Dickey's misconduct (a public interest you have not asserted here). To the extent there may be greater public interest in Mr. Dickey's particular case, we note that substantial information about the case is available on OSB's website, including the 20-page opinion of the disciplinary trial court. And because we find that OSB's fee was reasonably calculated in relation to the amount of work OSB estimates is required to process your request, we do not believe the fee would meaningfully impede the public's interest in learning about Mr. Dickey's case.

[3] Your petition also expresses your intent "to continue making such requests for some time." Therefore, you ask us "to provide guidance now to the OSB on their *obligation* to [make] public records available without charge or, at least at low cost so that future appeals may not be necessary." (emphasis added). We are unable to grant your request. There is no general obligation under Oregon's Public Records Law requiring an agency to waive or reduce its fees, even when disclosure would primarily benefit the general public. As discussed above, Oregon law permits agencies to recover their actual costs in making records available. ORS 192.324(4). Oregon law also gives agencies discretion to deny a fee waiver requests so as long as their decisions to do so are reasonable under the totality of the circumstances. *See* ORS 192.324(5); and *In Defense of Animals*, 199 Or App. at 190. Because the reasonableness of such decisions must be evaluated on a case-by-case basis, we cannot prospectively order OSB to waive any fees it may be statutorily permitted to charge in the future.