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May 4, 1994

Frank J. Dixon
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Re: Petition for Review of Denial of Fee Waiver
Oregon Health Sciences University Records

Dear Mr. Dixon:

This letter is the Attorney General's order on your petition on behalf of your client, Committed to Animal Protection, Education and Rescue (CAPER), for review of the Oregon Health Sciences University's (OHSU) denial of CAPER's request for a waiver of fees under the Oregon Public Records Law, ORS 192.410 to 192.505.[1/] Your petition asks the Attorney General to grant a complete fee waiver with regard to the fees assessed by OHSU in responding to CAPER's public records request. No request was made by CAPER for a fee reduction, nor did OHSU offer a reduction before this petition was filed. However, the agency has now offered to reduce the fee by 25 percent. For the reasons expressed below, we find that the agency's denial of a complete waiver was not unreasonable and, therefore, respectfully deny your petition.

1. Background

This petition concerns the fees charged by OHSU to make available Institutional Animal Care and Use Committee protocols requested by CAPER pertaining to research being done at OHSU using animals.

[1/] Your petition was sent to Assistant Attorney General Jim Mattis in Eugene, who forwarded it to the Attorney General's office in Salem. See ORS 192.470(1). We appreciate your willingness to extend the time for the Attorney General to respond to the petition to May 4, 1994.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. See ORS 192.420. The Public Records Law also authorizes a public agency to establish fees "reasonably calculated to reimburse it for its actual costs in making records available." ORS 192.440(2). "Actual costs" in making records available includes those costs actually incurred by an agency in searching for records that are responsive to the request, reviewing those records in order to delete exempt material and, if necessary, excising the exempt portions or otherwise preparing the records for release. Actual costs may also include duplication costs. OHSU's public records fee rule is contained in OAR 572-01-020.

OHSU states that it expended $230.52 for eight hours of a record clerk's time to respond to CAPER's records request. For an additional $37.50, OHSU would make copies of the requested records available to CAPER. However, CAPER could avoid or reduce the $37.50 charge if a representative of CAPER went to OHSU, reviewed the records and requested copies of fewer records than all of those made available for review.

CAPER requested a waiver of those fees, on the basis that the information in the protocols is of public interest and benefit, and that CAPER is a non-profit, charitable organization with the ability to disseminate the information to the public. CAPER believes that if society becomes better informed about its use of animals for research purposes, society will be more sensitive to their use and alternatives will be sought out. Further, CAPER asserts that because much of the funding of research using animals is from tax dollars, it is in the public's interest to know what research is being done, the kinds of animals used, etc., all of which information is in the protocols.

CAPER states that one of its purposes is to educate the public about animal protection and care issues, that it is developing an informational program about research on animals and that it's goal is to become a clearinghouse for information about animal research, particularly that done in the Northwest. CAPER describes its past activities and present plans for disseminating information, including speaking engagements and educational booths. CAPER states that because it is a small organization with less than $1,000 in donations in 1992, it would be an extreme financial hardship for CAPER to pay a fee for obtaining public information.

OHSU denied CAPER's waiver request because, among other reasons, OHSU concluded that CAPER's capacity to meaningfully disseminate the information to the public was inadequate, citing specifically to CAPER's referenced activities reflecting less and less

activities of actual dissemination of information to the public since 1991 and its limited funds.[2/]

2. Analysis

ORS 192.440(4) allows agencies to furnish copies of public records

> without charge or at substantially reduced fee if the custodian determines that the waiver or reduction is in the public interest because making the record available primarily benefits the general public.

It is important to note that Oregon law does not mandate a fee waiver or reduction; instead, it makes the decision to waive or reduce fees discretionary with the public agency. The legislative history demonstrates an intent to place a great deal of discretion in the custodian of the records. See Attorney General's Public Records Order of May 19, 1993, to Bruce E. Smith. Accordingly, we review an agency's denial of a fee wavier, not on how we might have responded, but rather on the basis of whether we believe the agency's decision is reasonable.

Although the requestor's inability to pay is a factor, that alone is not a sufficient basis for a fee waiver. ATTORNEY GENERAL PUBLIC RECORDS AND MEETINGS MANUAL (1993) at 10. Because the focus must be on the benefit to the general public, the requestor must be able to demonstrate an ability to disseminate the requested information to the general public.

OHSU's denial of a complete fee waiver is based upon its assessment that the information provided to OHSU by CAPER concerning its activities

> demonstrates a diminishing involvement in public disclosure and education. It appears that with the passage of time that [CAPER] has had fewer broadly based public contacts and that [its] plans for such activities in the near future are very nebulous.

We believe that this is an accurate description of CAPER's activities over the last few years. In 1991, CAPER published a paper, which was distributed by several means; had articles published in two newspapers; was interviewed by a radio station and a television station;

[2/] Because we conclude that this basis for OHSU's denial of the waiver request is reasonable, we do not address the other reasons initially asserted by OHSU for its denial.

spoke at a high school and a service club; and distributed flyers at rallies, educational booths and through direct mail. By 1993, CAPER had articles published only in a special interest newspaper, Animal People, and distributed Pet Theft flyers. At the time of its waiver request, CAPER had general plans for "Speaking engagements, Educational booths, Publication about animal research," but identified no concrete audiences or dates.

CAPER explains that is has always been a small, grassroots organization and that in shifting to its new goal of becoming a reliable source of information for the public about animal research, it cannot plan activities for the dissemination of that information until it has secured access to the information. However, this explanation provides no assurance that making the records available to CAPER will "primarily benefit[ ] the general public." While CAPER's shift in goals may explain why its educational activities have diminished, the fact of diminished actual activity remains. The mere statement that CAPER plans to become an information clearinghouse and to increase its activities is not sufficient. Cf. Crocker v. Department of Army, 577 F Supp (1984) (mere statement that material was to be used for a book is not dispositive of whether fee waiver would serve the public interest).[3/] Further, whether or not it gathers public information from OHSU is no reason that CAPER now could not be educating the public on the general issue of using animals for research.

OHSU also noted that CAPER appears to have insufficient funds to broadly disseminate the information that it seeks. CAPER does not deny its limited financial capacity and has provided no information to show that the donations it received in 1993 were any more than (or even as much as) the $1,000 it received in 1992. Although we are not prepared to conclude that an organization with such little funding cannot adequately disseminate information to the public, we do not believe that OHSU acted unreasonably in taking CAPER's limited funding into consideration in assessing whether waiving its fees would, in fact, benefit the public.

Notwithstanding its denial of a complete fee waiver, OHSU has now offered to reduce its fee by 25 percent. ORS 192.440(4) does not require an agency to grant a complete fee waiver, even if the public interest test is met. See Public Records Order, July 8, 1991, Marr/Rees. Because of what we find to be legitimate concerns about CAPER's ability, both

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[3/] Because the public interest test in ORS 192.440(4) was modeled on the federal Freedom of Information Act, 5 USC § 552(a)(4)(A), we believe the Oregon courts would look to the federal courts' construction of that Act for guidance in applying the fee waiver provision of the Oregon Public Records Law. See ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1993) at 10.

practically and financially, to publicly disseminate the information contained in the OHSU records, we cannot say that OHSU was unreasonable in denying a complete fee waiver, particularly in light of its offer to reduce the fee by 25 percent. Accordingly, we respectively deny CAPER's petition.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to
Attorney General

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cc: Dennis Borden
OHSU Assistant Vice President
Research Administration