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October 15, 2020

VIA E-MAIL ONLY: cerickson97838@yahoo.com

Chuck Erickson
Director, Clam Digger Association of Oregon
PO Box 1083
Coos Bay, OR 97420

Re: Petition for Public Records Fee Waiver
Oregon Department of Fish and Wildlife
DOJ File No.: 629110-GA0095-20

Dear Mr. Erickson:

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 us to order the Oregon Department of Fish and Wildlife (ODFW) to waive its fee for creating lists of certain information. For the reasons that follow, 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). However, the Public Records Law does not require agencies to create new records in response to a records request. *See Attorney General's Public Records and Meetings Manual* at 7 (2019). Agencies may also 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). Any person denied a fee waiver or reduction by a state agency may petition the Attorney General for review. ORS 192.324(6). The agency carries the burden to sustain its action. ORS 192.411(1).

According to the record, on August 30, 2020, you requested from ODFW a list of the names of all individuals, organizations, or businesses that acquired lists of licensee e-mail addresses from ODFW between 2010-2020. On September 3, 2020, you expanded your request to also include a list of the fees ODFW collected as part of those disclosures. You also requested a waiver of the fees associated with processing your request because you intend to use the lists to inform the public about ODFW's "selling" of licensee personal information.

ODFW responded to your request on September 24, 2020 by informing you that it does not maintain lists of the information you requested. ODFW also advised you that, although the Public Records Law does not require ODFW to create new records, ODFW was willing to do so in this instance if you were willing to pay the costs associated with compiling the lists. ODFW estimated it would take 24 hours of clerical time to compile the lists from available records, at an estimated cost of $587.50. Thereafter, ODFW denied your request for a fee waiver on September 30, 2020, noting that "the Department is still exercising its discretion to create the list described in your request provided all fees associated with its production are paid." Your appeal followed.

In response to your petition, we contacted James Owens, Office Specialist in the Office of the ODFW Director. As a preliminary matter, he explained ODFW's position that the department does not "sell" licensee personal information in the commercial sense. Rather, when ODFW receives public records for licensee information, ODFW discloses non-exempt data as required by the Public Records Law. According to Mr. Owens, the fees ODFW collects during these transactions are intended to reimburse ODFW for the cost of processing the requests, which is permissible under the Public Records Law. *See* ORS 192.324(4). He also explained that, although ODFW has disclosed licensee e-mail addresses in the past in response to public records requests, ODFW has not done so since the legislature made personal e-mail addresses expressly exempt from disclosure several years ago. *See* ORS 192.355(40). Regarding the lists you requested, Mr. Owens explained that ODFW does not maintain such lists but that lists could be compiled from information in other records that do exist. He also reiterated ODFW's position that the $587.50 fee is to reimburse ODFW for the costs of creating the lists, work that ODFW has, in its discretion, offered to perform in this instance.

As noted above, we have long opined that the Public Records Law does not require the creation of new records. And we cannot order an agency to disclose records that it does not have. It follows that when considering an appeal of a denial of a fee waiver, our authority is limited to evaluating an agency's fees for disclosing public records that are currently in the custody of the agency; it does not extend to evaluating any fees associated with an agency's offer to create new records. In this instance, Mr. Owens has advised us that ODFW does not maintain the lists you seek, and we have no reason to second-guess his representation. Although ODFW has offered to compile the lists from other available records, ODFW is not required to do so in this instance. And because we have no authority to compel ODFW to create the lists, we cannot compel ODFW to waive the fees associated with ODFW's offer to create them. We therefore respectfully deny your petition.

Sincerely,



FREDERICK M. BOSS
Deputy Attorney General

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c: via e-mail only: James Owens, ODFW