ELLEN F. ROSENBLUM
ATTORNEY GENERAL

FREDERICK M. BOSS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
Telephone: (503) 378-6002

November 10, 2020

VIA E-MAIL ONLY: wpco691@gmail.com

Thomas D. DeMartino
7182 SE Darling St.
Salem, OR 97317

Re: Petition for Public Records Fee Waiver
Oregon State Bar
DOJ File No.: 993001-GA0105-20

Dear Mr. DeMartino:

This letter is the Attorney General's response to your petition under the Oregon Public Records Law, ORS 192.311 to 192.431. Your petition, which we received November 3, 2020, asks the Attorney General to order the Oregon State Bar (OSB) to waive its fee estimate for disclosing certain billing records. For the reasons discussed below, 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). Agencies may establish fees reasonably calculated to recover actual costs in making public records available and may require prepayment of fees before making records available. *See* ORS 192.324(4)(a) and 192.329(3)(a). If an agency provides a requester with a fee estimate, the agency's obligation to complete its response is suspended until the requester pays the fee or the fee is otherwise waived. ORS 192.329(3)(a). Agencies may also disclose records "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).

Your initial request to OSB, dated October 29, 2020, generally sought the itemized billing statements from the Fetherston Edmonds Law Firm for defense services it provided in a 2010 civil lawsuit filed by you. You also requested a waiver of all fees associated with furnishing the records. You e-mailed your request to Helen Hierschbiel, the OSB Chief Executive Order, who responded by asking you to submit your records request through OSB's online records request portal. You replied on November 1, 2020, indicating that you were not comfortable using OSB's portal and requesting that OSB process your request without requiring you to use the portal. On November 2, 2020, OSB again requested that you submit your request through the online portal. Your petition followed. You initially asserted that OSB's insistence that you submit your request through the online portal is equivalent to a denial of your records request.

In response to your petition, OSB notified you on November 4, 2020 that it would process your request without requiring you to submit it through the online portal. OSB informed you at that time that the estimated cost to furnish the records was $245.14 and that OSB required prepayment before it would begin processing your request. Although OSB did not require you to submit your request through the online portal, you were also informed that OSB entered your request into portal for tracking purposes.

You now object to the fact that OSB is using the portal to track and process your request without your permission. You note that you specifically asked that your records request not be tracked or associated with your e-mail address. You therefore believe that OSB's decision to enter your request and e-mail address in its tracking system is fraudulent and unprofessional and you request the Attorney General investigate your concerns. You also assert that OSB's fee estimate is retaliatory. We interpret your assertion to mean that you believe OSB has unreasonably denied your request for a fee waiver.

We begin by addressing your concerns about OSB's process for tracking records requests. The Attorney General's authority in the public records petition context is generally limited to evaluating a state agency's denial or partial denial of a request, a denial of a request for a fee waiver or reduction, or an agency's failure to comply with the processing timeframes provided in ORS 192.329. *See* ORS 192.407(1) and 192.411(1). The Attorney General's authority under the Public Records Law does not extend to investigating how state agencies maintain or retrieve their records, or the internal processes or tools they use to manage records requests – at least, not unless the effect of such processes is to deny access to public records. We must dismiss this aspect of your petition for a lack of jurisdiction because the complaints you raise have not, in fact, resulted in the denial of your access to public records.

We now turn to your claim that OSB unreasonably denied your request for a fee waiver. Under the Oregon Public Records Law, public bodies considering a request for a fee waiver must first determine whether making the records available primarily benefits the general public. *See* ORS 192.324(5). The furnishing of public records primarily benefits the public when its greatest utility is to the community or society as a whole. *See In Defense of Animals v. OHSU*, 199 Or App 160, 189 (2005). Pertinent factors include the requester's identity, the purpose for which the information will be used, the character of the information, whether the requested information

is already in the public domain, and whether the requester can disseminate the information to the general public. *Attorney General's Public Records and Meetings Manual* at 24 (2019). We have observed that regardless of the level of public interest in a particular matter, if the requester fails to demonstrate the ability to meaningfully disseminate the information to the public, disclosure will not primarily benefit the general public. *Id.*

In this instance, you have not described the purpose for which the records will be used or demonstrated any meaningful ability to disseminate the information to the public. We are not aware of any broad or heightened interest in these records among the general public. Rather, because you were the plaintiff in the 2010 lawsuit for which these billing statements were created, it appears that your interest in these records is primarily a private one. As we have previously explained to you, private interests are generally not sufficient to support a public interest fee waiver. *See* Public Records Order, Dec 5, 2016, DeMartino. Because your interest in these records appears to be private, and because you have not explained how obtaining these records will primarily benefit the general public, we cannot say that the OSB unreasonably denied your request for a fee waiver. We therefore respectfully deny your petition for a fee waiver.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:nog
c via e-mail only: Nik Chourey (OSB)