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fee waiver
actual cost

May 19, 1993

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Re: Petition for Review of Denial of Fee Waiver:
Children's Services Division Records

Dear Mr. Smith:

This letter is the Attorney General's order on your petition[1/] for review of the Children's Services Division's (CSD) denial of your client's requests for waiver of fees under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition, which we received on May 5, 1993,[2/] asks the Attorney General to grant a complete fee waiver or substantial reduction in the fees assessed by CSD in responding to two records requests. For the reasons below, we find that the agency's denial of a complete waiver or substantial fee reduction was not unreasonable and, therefore, respectfully deny your petition.

1. Background

This petition concerns the fees charged by CSD to make available portions of its files pertaining to the Bolden foster home in response to two separate public record

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[1/] The petition was filed on behalf of your client, Guard Publishing Company dba The Register Guard.

[2/] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

requests from your client. Your client, The Register Guard, was investigating the death of a seven-year old foster child residing in the Bolden foster home, who died alleged as a result of over-medication. Your client informed CSD that it was requesting the records to further its investigation of the circumstances of the death in the foster home for the purpose of providing information to the public in newspaper articles.

With respect to the first public records request, CSD charged your client $679.34 for its costs in making the records available. These costs were itemized as follow:

Attorney time	6 hours at $72/hr.	$432.00
Law Clerk time	3 hours at $28/hr.	84.00
CSD Management time	3 hours at $33.78/hr.	101.34
CSD Supervisory time	2 hours at $26.94/hr.	53.88
CSD Clerical time	1 hour at $8.12/hr.	8.12

Your client paid the fees "under protest" and subsequently requested a fee waiver or, in the alternative, a substantial fee reduction.

With respect to the second records request, CSD charged your client $36 for staff time to locate and process the records. Again, your client paid the fees.

CSD denied the request for a complete fee waiver, but agreed to refund $53.88 to your client, which represented a waiver of the costs of two hours of CSD supervisory time incurred in responding to the first records request. Mr. Rick McCreery, Lane CSD Supervisor, informs us that this reduction was in addition to a reduction of $116.25 for the costs of seven and a half hours of accounting staff time at $15.50 per hour incurred in responding to the second records request, for which CSD did not charge your client.

In addition to seeking an order requiring CSD to waive or substantially reduce its charges, your petition questions several cost items charged by the agency. We will discuss those "actual cost" issues first.

2. Reimbursement for "actual cost"

The Public Records Law confers a right to inspect any public records 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 cost in making records available." ORS 192.440(2). CSD has adopted such a rule, which includes charges for copying, staff time and "[w]hen an Attorney General's review or consultation is required by CSD, an additional charge * * * to cover the cost of that service." OAR 412-02-205.[3/]

"Actual cost" 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. See Attorney General's Public Records and Meetings Manual (1989) (Manual) at 6. Actual costs may also include duplication costs, supervising a person's inspection of original documents in order to protect the records and other costs for providing services such as certifying documents as true copies or sending records by special methods such as express mail.

The petition first challenges CSD's charges for attorney and law clerk time, asserting that "obtaining professional legal help to determine the parameters of the law is outside the contemplated 'actual cost' of providing records." We agree that legal

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[3/] OAR 412-02-205 provides:

> Under ORS 192.410-192.500 Children's Services Division will make available non-exempt public records for the requestor's inspection. If copies of non-exempt records are requested, a charge will be made to cover actual costs. If the request for copies involves minimal staff time, the charge will be ten cents a page. If the request is for ten pages or more and requires 15 minutes or more of staff time, the requestor will be charged for the actual cost of staff time taken to search, glean and edit the records; for computer costs if required; and for photocopying at ten cents a page. The minimum hourly charge for staff time will be eight dollars. When an Attorney General's review or consultation is required by CSD, an additional charge will be made to cover the cost of that service.

assistance to determine the parameters of the law is not a recoverable cost; CSD's charges to your client did not include such costs.[4/]

Your client's first records request sought disclosure of six categories of information concerning a family that has provided foster care since 1978. The nature of these CSD records are such that they contain a substantial amount of information for which Oregon statutes mandate confidentiality, see State ex rel Dugan v. Tiktin, 313 Or 607, 616, 837 P2d 959 (1992), requiring careful attention in order to properly segregate the exempt records from those that are not exempt. CSD requested this office to review the requested documents and to perform that segregation. Because of the broad scope of this request and the volume of records involved, the task of reviewing the records was substantial. CSD was charged for that legal work at this office's normal billing rates for attorney and law clerk time. Those charges represent CSD's actual cost for "compiling or tailoring such record * * * to meet the person's request." ORS 192.440(3). See also Marr/Rees Public Record Order (July 8, 1991) (sustaining CSD's recovery of its actual costs for counsel to review records to determine which portions must be excised). We conclude that the costs of attorney and law clerk time reviewing and segregating the records are recoverable by CSD as "actual costs" of making the records available.

Next the petition questions CSD's charge for "management time" and "supervisory time" responding to the first records request. As explained in CSD's denial, "management time" refers to the time spent by CSD management in responding to the request, including communication with your client. Ms. Susie Dey, Lane CSD Branch Manager, informs us that she gave this records request her personal attention, requesting appropriate staff to locate and compile the records, arranging for counsel to review and segregate the exempt records and communicating with your client by telephone and by FAX. Although Ms. Dey spent many more hours on related issues, such as discussing legal issues with counsel and communicating with the central office of the agency, the three hours charged as "management time" represent her actual time directly related to making the records available.

[4/] CSD incurred approximately $1125 in costs for legal advice from this office concerning issues arising from your client's record requests. The agency did not seek to recover these costs from your client.

"Supervisory time" refers to the time required by CSD supervisory staff to review, sort and compile the record information. Ms. Dey informs us that the two hours of supervisory time represents the actual time spent by the CSD foster care certifier and the certifier's supervisor in reviewing the certification files to determine that all material encompassed by your client's request was located and compiled for review and segregation by counsel. Ms. Dey informs us that different aspects of foster home certification issues are maintained in different files and that, due to the breadth of your client's record request, it took two hours to locate and compile the records.

We conclude that CSD's charges for the attorney, law clerk, management and supervisory time are the kinds of "actual costs" authorized by ORS 192.440. The next question is whether CSD unreasonably denied a fee waiver or reduction.

3. Waiver or reduction of fees in the public interest

ORS 192.440(4) allows agencies to furnish copies "without charge or at a 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." A person who believes that a state agency has unreasonably denied a fee waiver or reduction may petition the Attorney General to review the agency's decision. ORS 192.440(5). You have petitioned the Attorney General under this provision on behalf of The Register-Guard.

The statute does not mandate a fee waiver or reduction, instead making the decision to waive or reduce fees is discretionary with the agency. The legislative history demonstrates an intent to place a great deal of discretion in the custodian of the records. Representative Mannix stated:

> I don't think we should be telling every agency of government that they must reduce fees or even suggesting that they must. I'd like to give them leeway to do so. I'd also like to make it clear that they're not engaging in bad government by doing so. So it's important to tell them its OK for you to waive fees or reduce fees in the exercise of your discretion. Saying 'may' makes it clear that its discretionary but it still gives them some guidance as to the fact that it's OK.

Testimony of Representative Kevin Mannix, House Committee on Judiciary, Subcommittee on Crime, Hearing Tape 67, Side A, 1350 (April 6, 1989).

In this case, CSD granted a fee waiver of $53.88. In addition, the fee charged for the second request was reduced by $116.25. CSD chose not to grant a complete waiver of the fee or any further reduction.[5/]

The Public Records Law provides that fees may be waived or reduced if that is in the public interest because making the records available primarily benefits the general public. ORS 192.440(4). Relevant factors include: the requestor's identity, subject of the request and purpose for which the requestor intends to use the information, the informative value of the information to be disclosed, the contribution to an understanding of the subject by the general public likely to result from disclosure, the significance of the contribution to public understanding, the existence and magnitude of a commercial interest, and any financial hardship on the agency from granting a fee waiver. See Manual, supra, at 8.

We find that there is a public interest in the subject of the request -- information about the circumstances of care in the foster home where a child recently died. Both the nature of the information and your client's ability to disseminate the information to the public in a meaningful form lead to this conclusion. However, your client's commercial interest and ability to pay for the records must also be factored into the public interest in granting a fee waiver.

The petition relies on Badhwar v. United States Department of Air Force, 615 F Supp 698 (D DC 1985), cited in the Manual, supra, at 9-10. Badhwar held that, under the federal Freedom of Information Act, the refusal to waive fees in connection with a records request by representatives of the news media was arbitrary and capricious. However, in Badhwar, the requestors demonstrated without contradiction that their means were limited and that the fee requirement had inhibited their requests

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[5/] The petition refers to CSD's administrative rule, OAR 412-02-210 as unduly restrictive and contrary to ORS 192.440(4). While the rule clearly permits waiver or reduction in specific situations typically faced by the agency, we do not interpret the rule to preclude authority to grant a waiver or fee reduction in other situations governed by ORS 192.440(4).

for and use of documents. 615 F Supp at 707. Here, however, there has been no showing that the fee requirements inhibited your client's ability to request or use the records it sought.[6/]

When the Oregon Public Records Law was amended in 1989 to permit fee waiver or reduction, the House Judiciary Subcommittee on Crime rejected a proposed amendment that would have stated: "The Legislative Assembly considers the furnishing of records under a fee waiver or at a reduced fee to journalists, scholars, authors and those unable to pay a fee to be consistent with the public interest." House Judiciary Sub-Committee on Crime, Proposed Amendments to House Bill 2571 (March 20, 1989). The Staff Measure Summary explained:

> The Committee discussed whether journalists, authors and scholars should routinely be granted fee waivers and reductions as under the federal Freedom of Information Act. The Committee debated whether journalists, who are part of a commercial enterprise, should receive fee waivers or reductions.

Id. The Committee's sentiment was reflected by the statement of Representative Calouri during debate on the House floor, as follows:

> Frankly, some of the media representatives would like to have as much documentation as they'd think about asking for provided to them for nothing. It is not the intention of this bill that should be the case. It does have in there about the ability of the agency to provide for the public good. There was some discussion about the possibility of putting things like students and authors and so forth in there and we did not do that. This is strictly up to the discretion of the agency but at the same time it is also understood that the agencies will not gouge people with multiples of their actual costs. But I think it is important to just make it clear on the record that this does not give commercial organizations, of which the news media are a part of that class, the ability to go in and ask

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[6/] Moreover, unlike the Freedom of Information Act in effect at the time of the Badhwar decision, 5 USC § 552(a)(4)(A)(1985), the Oregon Public Records Law does not mandate a fee waiver.

> for anything they want and have it all given to them for absolutely nothing.

House Floor Debate, Tape 17, side 2, 368-374 (April 27, 1989). Consistent with legislative intent, investigative reporters are not automatically entitled to a complete fee waiver or substantial reduction in fees.

Here, the public interest in obtaining the information was not hindered by CSD's request for prepayment of charges nor by its denial of a complete fee waiver or substantial reduction. The public also has an interest in obtaining reimbursement of its actual costs for providing records. In this case, only about half of the records requested could be released to the public due to confidentiality. For the exempt records, no public benefit from dissemination occurred, yet the agency had the expense of reviewing and segregating those records.

Our task on review of CSD's denial is to determine whether there has been an "unreasonable" denial of a fee waiver or fee reduction. ORS 192.440(5). At the request of the House Judiciary Subcommittee on Crime, the then-Deputy Attorney General, Jim Mountain, listed some criteria this office would apply in considering a public records petition concerning the denial of a fee waiver or reduction:

- The extent of time and expense and interference with the business of the agency;
- The extent of the sheer volume of the records requested;
- The necessity to segregate exempt from non-exempt materials; and
- The extent to which an examination is insufficient for the public interest or for the particular needs of the requestor.

Testimony of Deputy Attorney General Jim Mountain, House Judiciary Subcommittee on Crime, HB 2571 Tape 67, side A, 1359-1400 (April 6, 1989). Representative Mannix followed up, stating: "I would like it understood that the kinds of considerations mentioned by the Deputy Attorney General, Jim Mountain, are appropriate considerations for the Attorney General to apply should some controversy arise as to fee waivers or reductions." Committee Chair Representative Tom Mason

replied: "I have no objection to that. I think that might be an appropriate articulation of the legislative record in regard to those standards. Any objection to that? So ordered." Id. at 1403-1406. Accordingly, we will apply those criteria to determine whether CSD's denial of a complete fee waiver or additional fee reduction is "unreasonable."

a. **Extent of time and expense and interference with the business of the agency**

Responding to both record requests required approximately in excess of six hours of CSD supervisory, management and staff time at the CSD branch office to locate the records, review the records and facilitate their production; seven and a half hours to search for non-computerized foster care payment records at the CSD central office; and nine hours of attorney/law clerk time to review the records and excise exempt from non-exempt materials from the records. This represents substantial time and expense incurred by CSD in responding to the records requests.

According to Ms. Dey, your client repeatedly emphasized the urgency of her request, as a journalist, and the agency gave its response very high priority. Consequently, responding to the request interfered with CSD's normal activities.

b. **Extent of the sheer volume of the records requested**

The Bolden foster home file is huge, representing care of special needs foster children for CSD since 1978. The scope of the records request encompassed not only the main foster home certification file, but also additional information about the foster home maintained by CSD in separate files. Linda Grimms, the Assistant Attorney General who reviewed the records at CSD's request, estimates that all components of the files reviewed totalled several hundred pieces of paper, a stack of paper approximately five inches thick. The requested records were voluminous.

c. **Necessity to segregate exempt from non-exempt materials.**

Foster home certification files and related records contain a combination of records, some of which are exempt from disclosure under the Public Records Law and others that are not exempt. Here, the scope of the request included both confidential information (child abuse investigation reports and records and the identities of children

in CSD's legal custody placed in the foster home) and non-confidential information. This combination of exempt and non-exempt material within the requested records required segregation and excising of exempt materials, ORS 192.505, sometimes line-by-line, within the entire volume of records.

d. **Extent to which an examination is insufficient for the public interest or for the particular needs of the requestor.**

The non-exempt portions of the file subject to review were made available for inspection by your client. Your client promptly had copies made at her own expense. The petition does not raise any objections to duplication costs.

Conclusion

In our Marr/Rees Public Record Order, supra, at 2, we explained that satisfying the public interest test does not entitle a requestor, as a matter of law, to a complete fee waiver. In the Manual, we noted that the potential hardship on an agency that would arise from granting a fee waiver is pertinent to the reasonableness of the agency's decision. Manual at 8. Given the extent of time and expense to CSD, the volume of the requested records, and the necessity to segregate exempt from non-exempt records, we conclude that CSD's decision to reduce its fees by a total of $170.13, instead of granting a complete fee waiver or more substantial fee reduction was not "unreasonable."

For these reasons, we respectfully deny your petition for complete waiver or substantial reduction of fees.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO,
Special Counsel to the Attorney General

ESH:jpl/JGG06B0F.W51
cc: Ms. Susie Dey, Lane CSD Branch Manager