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

March 29, 2021

**VIA E-MAIL ONLY**: dpicray@yahoo.com

David Picray
5400 Quince St.
Sweet Home, OR 97386

Re: Petition for Public Records Disclosure Order
*Oregon Department Fish and Wildlife*
DOJ File No.: 635020-GA0031-21

Dear Mr. Picray:

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 asks the Attorney General to order the Oregon Department of Fish and Wildlife (ODFW) to waive its $37.50 fee to produce records that show which Oregon lakes have been stocked with trout since September 2020, including the dates they were stocked. 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 actual costs in making public records available, but may waive or reduce fees if doing so "is in the public interest because making the record available primarily benefits the general public." ORS 192.324(4)–(5). Even if waiving or reducing the fee is in the public interest, agencies have discretion whether or not to grant such waivers or reductions. *In Defense of Animals*, 199 Or App at 189 (2005). An agency's decision to deny a fee waiver or reduction must be reasonable. *Id.* at 190. Any person who believes their request for a fee waiver or reduction was unreasonably denied by an agency may petition the Attorney General for review. ORS 192.324(6). Although the Attorney General generally does not have the authority to review the reasonableness of a fee estimate, the Attorney General may evaluate claims that "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 recoup the agency's actual costs." *Attorney General's Public Records & Meetings Manual* 22 (2019).

In response to your petition, we contacted Michelle Tate, Executive Assistant in the Office of the ODFW Director. She informed us that ODFW did not receive a request from you

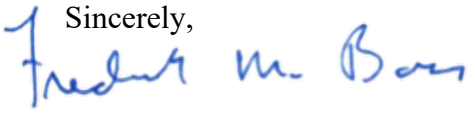
for a fee waiver or reduction. She explained ODFW's position that if it had known you were opposed to the fee estimate, the department would have offered to work with you to narrow the scope of your request to reduce or possibly eliminate the fee. She also explained ODFW's position that the $37.50 fee is an accurate estimate of the actual cost of making these records available to you. She explained that the timeframe of your request coincides with a period of time where the normal trout stocking schedule was suspended due to multiple large wildfires across the state. Consequently, she explained, ODFW does not possess a single report that contains the information you seek and ODFW estimates it will take two hours to locate and gather responsive records from multiple field offices around the state.

Insofar as your petition asks us to order ODFW to waive its fee estimate, we deny your petition as premature. Under ORS 192.324(6), our authority to review such a request is contingent upon an agency having denied a request for a fee reduction or waiver. And our authority in such cases is limited to evaluating the reasonableness of the agency's denial decision; i.e., our authority does not include evaluating the reasonableness of the fee itself unless it appears the purpose of the fee was to constructively deny the underlying request. In this instance, there is no denial decision for us to review because you did not request a fee reduction or waiver from ODFW. We therefore conclude that your petition is premature.

Although you have not specifically raised the issue of constructive denial, we are also satisfied that ODFW's fee estimate was not designed to constructively deny your request. Ms. Tate provided a reasonable explanation for why it will take two hours to retrieve the information you seek. Under the circumstances, ODFW's fee estimate appears reasonably calculated recoup ODFW's actual costs of processing your request. And we also note that ODFW is obligated to refund the difference if, after receiving payment and processing your request, the estimate later proves to have been too high.

For the foregoing reasons, we respectfully deny your petition.

Sincerely,



Frederick M. Boss
Deputy Attorney General

FMB:pjn/
c via email only: Michelle Tate, ODFW