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

April 9, 2021

VIA EMAIL ONLY: plantaegroup@outlook.com

Andrew Anderson
P.O. Box 8042
Bend, OR 97708

Re: Petition for Review of Public Records Fee and Estimated Completion Date
Oregon Liquor Control Commission
DOJ File No. 845600-GA0033-21

Dear Mr. Anderson:

This letter is the Attorney General's response to your March 24, 2021 petition[1] under the Oregon Public Records Law, ORS 192.311 to 192.431. Your petition asks the Attorney General to evaluate the reasonableness of a fee estimate and estimated completion time frame provided to you by the Oregon Liquor Control Commission (OLCC) in response to a records request. For the reasons discussed below, we respectfully deny your petition.

Your petition relates to your request to OLCC for all documents in its custody that relate to you, Jocelyn Anderson or several businesses owned by you, and specifically including all correspondence and marijuana licensing and compliance records from January 2015 to present. Your petition explains that you need these records for potential litigation involving OLCC's recent decision to revoke four of your OLCC licenses. In response to your request, OLCC provided you with a fee estimate of nearly $5,500.00 and estimated that it would take 44 weeks to complete its response to you. Your petition asserts that OLCC has intentionally inflated the cost and completion time frame to prevent you from obtaining the records for use in litigation.

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[1] We thank you for granting an extension on the deadline to issue this order.

Turning first to OLCC's fee estimate, we note that agencies may establish fees reasonably calculated to recover actual costs in making public records available.[2] ORS 192.324(4). Although there is no provision in the Public Records Law authorizing the Attorney General 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* at 22 (2019) ("*Manual*") (citation omitted).

In response to your petition, we contacted Jeannine Stickle, OLCC Public Records Coordinator. She explained how OLCC calculated its fee estimate and provided us with a spreadsheet of its calculations. She explained that OLCC has already dedicated more than 15 hours searching for and compiling 19,750 responsive emails and nearly 200 license and compliance records. She explained that all of those records must be reviewed to identify and redact information that is exempt from disclosure. She estimates it will take OLCC nearly 220 hours to conduct that review and complete its response to you. At OLCC's fixed cost of $25 per hour, this equals a total estimated cost of nearly $5,500.00. She indicated that OLCC has offered to work with you to narrow your request in an effort to reduce the fee, but that you declined. She also noted that this is only an estimate and that OLCC will refund any amount that exceeds its actual costs to produce the records.

Under the circumstances, we cannot say that the true purpose of OLCC's fee estimate is to constructively deny your request. Ms. Stickle has adequately demonstrated to us that responding to your request will require a significant commitment of OLCC time and resources. Given the broad scope of your request and the substantial volume of records to be reviewed, the 220-hour estimate seems realistic. We are therefore satisfied that OLCC's fee estimate is reasonably calculated recoup OLCC's actual costs. And we note that OLCC is obligated to refund the difference if, after receiving payment and processing your request, the estimate later proves to have been too high. We therefore deny this aspect of your petition.

Next, we turn to your assertion that OLCC's estimated completion time frame of 44 weeks is unreasonably long. Agencies are obligated to respond to records requests "as soon as practicable and without unreasonable delay." ORS 192.329(1). An agency that is unable to complete its response within fifteen business days of receiving a written request is required to provide a written statement that the public body is still processing the request and provide a reasonable estimated completion date based on the information currently available. ORS 192.329(5). If an agency has provided the requester with a fee estimate permitted under ORS 192.324(4), its obligation to complete its response is suspended until the fee has been paid or waived. ORS 192.329(3). A person who has submitted a written request for records to a state

[2] Agencies may furnish records "without charge or at 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). And any person denied a fee waiver or reduction by a state agency may petition the Attorney General for review. In this instance, however, there is nothing in the record indicating that you requested a fee waiver or reduction. Therefore, to the extent your petition asks us to order OLCC to waive or reduce its fee estimate, we deny your petition as premature because our authority to review such a request is contingent upon an agency having denied a request for a fee reduction or waiver. *See* ORS 192.324(6)

agency may petition the Attorney General if they believe the estimated completion time frame for the agency's response is "unreasonably long and will result in undue delay of disclosure." ORS 192.407(1)(b).

In light of your petition, Ms. Stickle informed us that OLCC has agreed to dedicate additional resources to processing your request and the agency now estimates it can complete its response in approximately 25 weeks. Although 25 weeks is a still a significant period of time, it represents a considerable reduction from OLCC's original estimate. And given the substantial volume of records to be reviewed, we cannot conclude that 25 weeks is unreasonable based on the information currently available. We also find no evidence for concluding that OLCC's estimated completion time frame was designed to impair your ability to litigate certain matters. And as we have previously concluded, the ordinary tools of civil discovery generally "negate the need to use the Public Records Law to access records for purposes of pursuing private litigation." *Manual* at 53 (citation omitted). We therefore deny this aspect of your petition for now.

Notwithstanding our conclusion that OLCC's current estimate is not unreasonable, we observe that OLCC's statutory obligation to respond to your request in a timely manner means that processing your request must take precedence over OLCC's non-statutory activities. *See* Public Records Order, Jan 14, 2014, Budnick. Because OLCC remains obligated to process your request as soon as practicable and without unreasonable delay, it would not be reasonable for OLCC to treat its current estimate as a fixed deadline if additional resources are available that make it practicable to respond sooner. In other words, OLCC may not treat its estimate as an artificial cap on the amount of time it devotes to processing your request during any given period. The point of the statutorily required estimate is to give the requester a sense of when a response can reasonably be expected, not to allow an agency to limit the amount of available resources that it devotes to its statutorily required response. Because we believe OLCC is capable of disclosing non-exempt records as they are identified, we also expect that OLCC will provide periodic partial responses to you rather than providing a single response once it completes its entire review. In light of these expectations, we intend to monitor OLCC's progress on responding to you, should you elect to proceed with your request.

For the foregoing reasons, we respectfully deny your petition.

Sincerely,

Frederick M. Boss
Deputy Attorney General

FMB:pjn
c via email only: Jeannine Stickle (OLCC)