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

August 25, 2021

VIA E-MAIL ONLY: meriel@crag.org and lauri.g.kunze@odot.state.or.us

Meriel Darzen
Crag Law Center
3141 E. Burnside St.
Portland, OR 97214

Lauri Kunze
Oregon Department of Transportation
355 Capitol St NE, MS 51
Salem, OR 97301

Re: Petition for Public Records Fee Waiver or Reduction
Oregon Department of Transportation
DOJ File No.: 734990-GA0115-21

Dear Ms. Darzen and Ms. Kunze:

This letter is the Attorney General's response to Ms. Darzen's petition, submitted on behalf of Cascadia Wildlands ("Cascadia"), under the Oregon Public Records Law, ORS 192.311 to 192.431. Her petition asks the Attorney General to order the Oregon Department of Transportation (ODOT) to waive or substantially reduce its fees to produce all records relating to the 2020 wildfire debris removal program. For the reasons discussed below, we respectfully deny the petition in part and grant the petition in part.

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, 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). Even if waiving or reducing the fee is in the public interest, agencies have discretion whether or not to grant such waivers or reductions. *See In Defense of Animals v. OHSU*, 199 Or App 160, 189 (2005). However, an agency's decision to deny a fee waiver or reduction must be reasonable under the totality of the circumstances. *Id*. at 190. 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 decision. ORS 192.411(1).

The Attorney General does not generally have the authority to review the reasonableness of a fee estimate, or to determine whether an estimate accurately reflects the actual cost to the agency of disclosing public records. *See Attorney General's Public Records and Meetings Manual* at 22 (2019). However, 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." *Id*.

Ms. Darzen's petition stems from Cascadia's April 1, 2021, request to ODOT for:

1. All documents outlining, guiding, or otherwise pertaining to the removal of hazard trees following the wildfires beginning in September 2020.

2. All documents pertaining to criteria for hazard tree removal and hazard tree assessment (measuring and/or analyzing the hazard, imminent danger, and health of trees) in post-wildfire roadside areas – including but not limited to consulting documents with other agencies or contractors, internal guidance documents, environmental compliance, and monitoring documents.

3. All documents calculating or estimating the roadside mileages and acreages of hazard tree assessment or removal activity in post-wildfire roadside areas.

4. All documents pertaining to hazard tree removal and hazard tree assessment in any roadside in the following fire zones:

    a. Riverside Fire: along Highway OR 224 (e.g., MP 20-60) and all other Clackamas County roadside hazard tree assessment and removal activity.

    b. Beachie Fire: along Highway OR-22 (e.g., MP 10-70) and all other Linn County, Marion County, and Clackamas County roadside hazard tree assessment and removal activity.

    c. Holiday Farm Fire: along Highway OR-126 (e.g., MP 10-60) and all other Lane County and Linn County roadside hazard tree assessment and removal activity.

    d. Two Four Two Fire: along Highway OR-422 (e.g., MP 0-10), Highway OR-62 (e.g., MP 80-110), and US 97 (e.g., MP 230-260), and all other Klamath County roadside hazard tree assessment and removal activity.

    e. Archie-Thielsen Fires: along Highway OR-138 (e.g., MP 10-50; 70-90) and all other Douglas County roadside hazard tree assessment and removal activity.

5. All documentation related to the Federal Emergency Management Agency's (FEMA) correspondence, including but not limited to applications, appeals, or compensation pertaining to roadside hazard tree activity, and documentation implicating any paved road in any FEMA process following the 2020 wildfires.

6. All documents in connection with contractors involved in hazard tree removal and/or hazard tree assessment, including but not limited to consulting documents, financial and budgetary documents, payments, receipts, and contracts with personnel for any hazard tree assessment or removal activities, environmental compliance, and monitoring documents.

Cascadia also requested ODOT waive or reduce any fees associated with processing the request, indicating that it would use the records "to more fully understand ODOT's decision-making process surrounding post-fire roadside logging and inform the public and public officials of that decision-making process." ODOT denied Cascadia's request for a fee waiver or reduction on April 9, 2021. In its response, ODOT estimated that due to the large volume of records requested, processing Cascadia's request it would take more than 1,300 hours and involve approximately 105 employees. ODOT also indicated that it would reconsider Cascadia's request for a fee waiver or reduction if Cascadia reduced the scope of its request. We understand that representatives of Cascadia met with ODOT officials to explore ways to narrow the scope of the request, but that Cascadia has elected to proceed with its original request.

Ms. Darzen's petition appeals ODOT's decision to deny Cascadia's request for a fee waiver or reduction. First, she argues that ODOT has failed to demonstrate how the fee estimate is reasonably calculated to reimburse ODOT for its actual costs of processing Cascadia's request. Her argument is based, in part, on Cascadia's understanding that ODOT estimated that there are only 2,000 pages of documents at issue. She therefore asks us to conclude that ODOT's fee estimate was unreasonable and that the true purpose of the fee estimate was to constructively deny Cascadia's request.

Ms. Kunze has responded to Ms. Darzen's petition on behalf of ODOT. Regarding the 2,000-page figure cited in the petition, she explains that there are likely to be tens of thousands of responsive records and that a substantial portion of the fee estimate is based upon the time it will take to locate those records. It appears the 2,000-page figure Ms. Darzen referenced was derived from a small portion of ODOT's initial fee estimate, which included the cost for reproducing an estimated 2,700 pages of hard copy material. Ms. Kunze also notes that, except for electronic mail, ODOT must rely upon employees in various region and district offices to locate other electronic records that may be responsive to the request; i.e., ODOT does not a possess a centralized or automated capability for locating other types of electronic documents, such as word processor documents. Ms. Kunze provided us with two spreadsheets, which were also disclosed to Cascadia, that provide a detailed breakdown of how ODOT calculated its fee estimate. She indicates that it took ODOT nearly a week, and the assistance of approximately 70 employees, just to prepare the estimate. And, she notes, the fee estimate Cascadia received did not include an additional 10% of the costs that ODOT estimates it will incur to process the request. Ms. Kunze stresses that this is a "rough estimate" because ODOT has no prior experience processing such a large request. She also acknowledges that ODOT must refund the difference if the estimate later proves to be higher that ODOT's actual costs. Finally, she emphasizes ODOT's continued willingness to work with Cascadia to reduce the scope of the request, and thereby reduce the associated costs.

We find that ODOT has adequately described how its fee was calculated in relation to the large volume of responsive records that must be located and reviewed. Cascadia's request is very broad – it literally seeks *every* document pertaining to ODOT's hazard tree assessment and removal program in response to the 2020 wildfires – a very large operation spanning many areas of the state. We have no trouble concluding that processing Cascadia's request will require considerable time and resources. We do not see any basis to conclude that ODOT's estimate is inflated in order to deny the request, rather than reflecting ODOT's actual expectation of the work required to conduct a comprehensive search. Indeed, ODOT has consistently indicated that it is willing to continue working with Cascadia to focus the scope of the request, and thereby reduce ODOT's costs.

Next, Ms. Darzen asserts that ODOT unreasonably denied Cascadia's request for a fee waiver or reduction because the disclosure of these records will primarily benefit the general public. In support of her argument, Ms. Darzen cites the estimated $600 million cost to taxpayers for the wildfire debris removal program, the use of private contractors with little or no experience with wildfire recovery, the lack of a public environmental impact analysis over the project, the long-term impact on public roads and lands, and the lack of otherwise publicly available information about ODOT's program. She also explains Cascadia's ability to disseminate this information through its professional website, press releases, opinion articles and through its extensive contacts with other conservation groups, state and federal politicians, and the media.

According to Ms. Kunze, ODOT questions whether Cascadia qualifies for a public interest fee waiver or reduction. However, ODOT acknowledges the public interest in the hazard tree removal program generally because allegations have been publicly made regarding excessive tree removal, use of unqualified personnel, and the mismanagement of public funds. ODOT also recognizes that the disclosure of at least some of the records requested will primarily benefit the general public. In this regard, Ms. Kunze notes that some records were provided to Cascadia (and to members of the media who also requested them) at no charge, because ODOT determined that disclosing those records would primarily benefit the general public. But in light of the extremely broad nature of Cascadia's request, ODOT anticipates the expenditure of considerable time and resources to locate and review records that, in the vast majority of cases, would not meaningfully add to the public's understanding of these issues. For that reason, Ms. Kunze explains, to the extent Cascadia might qualify for a public interest fee waiver or reduction, ODOT nevertheless exercised its discretion to deny Cascadia's request.

Under the Oregon Public Records Law, agencies considering a request for a fee waiver or reduction 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 meaningfully disseminate the information to the general public. *Attorney General's Public Records and Meetings Manual* at 24 (2019) ("*Manual*"). If waiving or reducing processing fees

is in the public interest, agencies nevertheless have discretion whether to do so. When evaluating whether an agency's denial of a fee waiver or reduction was reasonable, we consider the character of the public interest in the particular disclosure, the extent to which the fee impedes that public interest, and the extent to which a waiver would burden the public body. *Id.*

In light of what we observe to be heightened public interest in the wildfire debris removal program, ODOT's acknowledgment that there are some responsive records the disclosure of which will primarily serve the public interest, and Cascadia's ability to disseminate this information to the general public, we are satisfied that Cascadia qualifies for a public interest fee waiver or reduction. We thus turn to ODOT's decision to completely deny a fee waiver or reduction in this instance. Our task in reviewing ODOT's decision is not to decide whether we would have made the same choice. Instead, we must determine whether ODOT abused its discretion because the decision was unreasonable under the totality of the circumstances.

In this instance, we acknowledge that ODOT is likely correct that the breadth of Cascadia's request means that many responsive records will contribute little or nothing to the public's understanding of this matter. Nor can we conclude that ODOT is wrong to anticipate that producing those records will entail significant work given the scope of Cascadia's request. Under the circumstances, and taking into account the factors described above, we conclude that ODOT did not abuse its discretion when it denied Cascadia's request for a complete fee waiver. However, given the heightened public interest in this topic and that disclosure of at least some portion of the records will primarily serve the public interest, we conclude that ODOT's complete denial of any fee reduction was unreasonable. As to the amount of the fee reduction, we take notice of the public interest reduced fee schedule contained in the Department of Administrative Services (DAS) *Statewide Policy on Public Records Requests Fees and Charges* (Feb 15, 2017). The DAS schedule provides for at least a 20% reduction in fees for the staff time associated with processing record requests when disclosure would serve the public interest. We think that such a reduction is reasonable under the current circumstances.

For the reasons discussed above, we deny the petition with respect to claims that ODOT constructively denied Cascadia's records request. But we grant the petition insofar as Cascadia seeks a fee reduction, and order ODOT to reduce its estimate by applying the rates specified in the DAS public interest reduced fee schedule.[1] ODOT has seven days within which to comply or to announce its intention to seek judicial review. ORS 192.401(3)(a) and 192.411(2).

Sincerely,



Frederick M. Boss
Deputy Attorney General

[1] We also note that ODOT's initial fee estimate erroneously double-billed for the cost of Department of Justice staff time required to process the request. ODOT must also correct that error when calculating its reduced fee estimate.

FMB:pjn