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Salem, Oregon 97310
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August 1, 1991

Lars K. Larson
KPTV 12
P.O. Box 3401
Portland, OR 97208

Re: Petition for Review of Denial of Fee Waiver
Marion County Trial Court Records

Dear Mr. Larson:

This letter is the Attorney General's order on your petition for review of the Marion County Trial Court Administrator's denial of your request for a waiver of fees under the Oregon Public Records Law, ORS 192.410 to 192.505.[1] The Trial Court Administrator will make the records you request available but has denied your request for a complete waiver of the fees applicable to providing the records. ORS 192.440(4). For the reasons which follow, we find that the department's denial of a complete waiver was not arbitrary or capricious and, therefore, respectfully deny your petition. We believe, however, that a partial waiver of the fees is appropriate in this case and approve the State Court Administrator's proposed fee reduction.

[1]We appreciate the courtesy of KPTV Assignment Editor Denny Shleifer in extending us a two-day extension of time to respond to your petition.

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).

In 1989, the Oregon Legislature enacted ORS 192.440(4) which allows agencies to furnish copies "without charge or at 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.

As we understand the facts of this case, you requested the Trial Court Administrator grant a fee waiver which was denied. No request was made for a fee reduction, nor did the department formally offer a reduction before you filed your petition the same afternoon. However, the agency has now offered to reduce the fee from $116.08 to $84.25.

We agree with your contention that a fee waiver or reduction is in the public interest. The reasons you set forth in your letter to the Attorney General of July 19 satisfy the public interest requirement under the factors we have identified previously. Attorney General's Public Records and Meetings Manual at 8. However, the fact that your request will benefit the general public does not entitle you to a complete fee waiver as a matter of law. ORS 192.440(4) gives the agency discretion to merely reduce, rather than entirely waive, the fee. As you know, the Oregon fee waiver provision was modeled after the federal Freedom of Information Act (FOIA), before the 1986 amendments to FOIA. *See* Attorney General's Public Records and Meetings Manual at 7. In analyzing petitions regarding fee waivers we look to federal courts for guidance, especially decisions

applying the pre-1986 law. *Id.* In Lybarger v. Cardwell, 438 FSupp 1075, *aff'd* 517 F2d 764 (CA 1, 1978), the court approved a fee reduction, rather than waiver, to an entity which met fully the "public interest" test -- a nonprofit organization funded by HEW to assist applicants for and recipients of Supplemental Security Income benefits. The court stated:

> [The] statute vests considerable discretion in agencies to determine whether or not a party requesting information may be charged a reduced copying fee and complete discretion as to the amount of the reduction to be offered.

Id at 766.

Given the considerable discretion afforded federal agencies under the fee reduction or waiver provision, courts review reductions under an arbitrary and capricious standard of review. 50 ALR Fed 552 (Freedom of Information Fees).

We have been informed by the State Court Administrator's office that it is willing, on behalf of the trial court administrator, to reduce the total fee for costs incurred for the records you seek to $84.25 -- the copying cost for copying 337 pages at .25 per page. This is the rate which was set by a 12/20/85 order of the Chief Justice (enclosed). The department will waive the cost for searching, editing and sorting the records, an amount totaling $31.83.

Under the circumstances, we do not believe this substantial reduction rather than complete waiver is arbitrary or capricious. The agency has cut the fee by more than 27%. It is charging you only for copying costs -- a practice in accord with the current version of FOIA which limits charges to news media to "reasonable charges for document duplication only." 5 USC § 552(a)(4)(A)(ii)(III). Moreover, the volume of your request was substantial and

not routine. *See* Lybarger, *supra* at 766. For these reasons, we respectfully deny your petition for a complete waiver of fees.

Sincerely,

PAMELA L. ABERNETHY
Special Counsel to the
Attorney General

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Enclosure
c (w/ incoming and enclosure):
R. William Linden, Jr., State Court Administrator, Supreme Court Building, Salem, OR 97310
Ann S. Christian, Indigent Defense Services Director, Office of the State Court Administrator, Supreme Court Building, Salem, OR 97310