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June 29, 2022

VIA E-MAIL ONLY: myers.j@icloud.com

Jeff Myers
Save Oregon Schools
8755 SW 165th Ave
Beaverton, OR 97007

Re: Petition for Public Records Disclosure Order
Oregon Department of Education
DOJ File No.: 581070-GA0055-22

Dear Mr. Myers:

This letter is the Attorney General's response to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, which we received June 22, 2022, asks the Attorney General to order the Oregon Department of Education (ODE) to disclose at no cost various data you identified in two separate records requests submitted on May 20, 2022. Your petition claims that ODE has failed to comply with applicable processing timeframes and that ODE unreasonably denied your requests for fee waivers. For the reasons that follow, we respectfully deny your petition.

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). The law is a disclosure law, and 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. *See* ORS 192.324(2) and 192.329(5). If an agency requests additional information or clarification from a requester in good faith, its obligation to process the request is suspended until the requester provides the requested information or affirmatively declines to provide that information. *See* ORS 192.329(4)(a).

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Agencies may also establish fees reasonably calculated to recover actual costs in making public records available but may waive or reduce their fees if a waiver or reduction "is in the public interest because making the record available primarily benefits the general public." ORS 192.324(4)-(5). If an agency informs a requester of a processing fee, its obligation to process a request is suspended until the fee has been paid or waived. *See* 192.329(3)(a).

A requester may seek review by the Attorney General if they believe an agency has failed to comply with the response timelines contained in ORS 192.329. ORS 192.407(1). An agency's failure to provide a timely response required by ORS 192.329 shall be treated as a denial of the request, unless the agency can demonstrate that compliance was not required under ORS 192.329. ORS 192.407(1)(a). A requester may also seek review by the Attorney General if they believe an agency has unreasonably denied a request for a fee waiver or fee reduction. ORS 192.324(6). The agency carries the burden to sustain its actions. ORS 192.411(1).

The available record shows that you submitted two records requests to ODE's Early Learning Division on May 20, 2022, for data relating to the Preschool Promise and COVID-19 Child Care Stabilization Grant Programs. ODE formally acknowledged your requests on May 27, 2022, and provided you with separate fee estimates to process each request. You requested public interest fee waivers for each request later that day. Over the next several weeks, you had multiple e-mail exchanges with ODE describing what data ODE may or may not possess, discussing and modifying the scope of your requests, and addressing your fee waiver requests. Importantly, you informed ODE on June 3, 2022, that you would be working with Hannah Grossman from Fox Digital News on any story related to the requested data.

Thereafter, on June 15, 2022, ODE provided you a revised fee estimate to process your first request, which was prompted by recent clarifications and modifications to that request. ODE also formally denied your request to waive the fees associated with your first request. However, ODE informed you that "it would be appropriate to grant a fee waiver to a request submitted by Ms. Grossman and Fox News for this information." ODE also informed you at that time that it was still revising its fee estimate for your second request, but that ODE's position regarding your request to waive the fees to process his second request was the same as for your first request; i.e., your request for a fee waiver was denied but ODE would waive the fee if Ms. Grossman or Fox News were to request the same data. Ms. Grossman subsequently requested the same data from ODE on June 21, 2022.

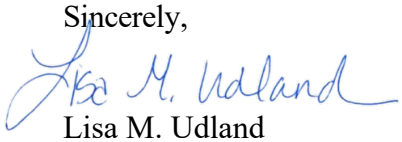
In response to your petition, ODE informed us that it is currently processing Ms. Grossman's requests without cost and that copies of ODE's responses will also be provided to you at no cost. Because ODE is providing the records to you at no cost, there is nothing further we could order ODE to do in that regard. We therefore respectfully deny your petition insofar as you seek an order directing ODE to waive its processing fees.

Next, we address your claim that ODE failed to provide timely responses to either of your requests as required by ORS 192.329. Your petition asks us to find that ODE responded to your requests with undue delay, order ODE to immediately produce the requested data, and order ODE to pay a penalty of $200.00 for each request. *See* ORS 192.407(3)(b). Under the circumstances, we respectfully deny this aspect of your petition. The record available to us

demonstrates that ODE provided you with initial fee estimates within five business days of receiving your request, which is well within the processing timeframes detailed in ORS 192.324 and 192.329. ODE's obligation to process either request was thereby suspended until such time as you paid the fees, or the fees were waived. *See* ORS 192.329(3). And given the scope of the initial requests and the time spent modifying and clarifying them, we do not see any other basis to find that ODE has responded with undue delay in this instance. It also follows that we lack the authority to order ODE to pay any penalties in this instance because the penalty provision in ORS 192.407(3)(b) is contingent upon an order granting the petition and a finding of undue delay.

For the reasons discussed above, we respectfully dismiss your petition.

Sincerely,



Lisa M. Udland
Deputy Attorney General

ACF:pjn
c via e-mail only: Robin Oden (ODE)