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November 7, 2022

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

Jeff Myers
8755 SW 165th Ave
Beaverton, OR 97007

Re: Petition for Public Records Disclosure Order
Oregon Department of Education
DOJ File No.: 581001-GA0100-22

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 October 31, 2022, asks the Attorney General to order the Oregon Department of Education (ODE) to immediately disclose certain records that you requested on October 17, 2022. Your petition also asks us to order ODE to waive any processing fees and order ODE to pay you a $200.00 penalty. For the reasons discussed below, we respectfully deny your petition in part and dismiss it in part.

Your petition stems from a request for "an export of all data in Smartsheet for public records requests submitted to ODE." Your request indicated that it was acceptable for ODE to omit the street address, zip code, and phone number of the requesters. ODE acknowledged your request on October 18, 2022, and provided you a fee estimate of $160.00 for the four hours of staff time ODE anticipates it will take to identify and redact any exempt information from the records. ODE also informed you that it would "omit the Street Address, City/State, Zip, Phone number, and Email fields as this is exempt from disclosure under ORS 192.355(3)."

Your petition raises two issues. First, because ORS 192.355(3)[1] only applies to certain contact information belonging to public employees, your petition asserts that ODE is attempting

[1] ORS 192.355(3) conditionally exempts "public body employee or volunteer residential addresses, residential telephone numbers, personal cellular telephone numbers, personal electronic mail addresses, driver license numbers, employer-issued identification card numbers, emergency contact information, Social Security numbers, dates of birth and other telephone numbers contained in personnel records maintained by the public body that is the employer or the recipient of volunteer services."

to limit the data it will provide by citing an exemption that does not apply to your request. Your petition states that ODE may remove the data you originally identified, but that you want us to order ODE to disclose the City/State and e-mail addresses of the public records requesters. Second, your petition asserts that the true purpose of ODE's fee estimate was to constructively deny your request because you do not believe the records need to be reviewed for exempt information.

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 exemptions from disclosure must be express. Any person denied the right to inspect or to receive a copy of a public record of a state agency may petition the Attorney General to review the record and determine if it may be withheld. ORS 192.411(1). The agency carries the burden to sustain any such denial. *Id*.

Agencies may establish fees reasonably calculated to recover actual costs in making public records available. ORS 192.324(4). If an agency informs a requester of a fee, its obligation to process a request is suspended until the fee has been paid or waived. *See* ORS 192.329(3)(a). There is no provision in the Public Records Law authorizing the Attorney General to review the reasonableness of an agency's fee estimate. *See Attorney General's Public Records and Meetings Manual* at 22 (2019) ("*Manual*"). However, we have interpreted ORS 192.411(1) to permit the Attorney General to evaluate an agency's fee "where 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*. (citation omitted).

We contacted Emily Nazarov, ODE Government and Legal Affairs Manager, regarding your petition. She explained ODE's position that the first part of your petition is premature because ODE has not processed your request or denied any aspect of your request. She also explained that the reference to ORS 192.355(3) in ODE's October 18, 2022, acknowledgment was erroneous, but noted that personal e-mail addresses are exempt under ORS 192.355(40). Ms. Nazarov also explained ODE's position that the fee estimate was calculated in good faith and was not intended to constructively deny your request. She informed us that the public records requests ODE receives occasionally contain information that ODE believes is exempt from disclosure, such as social security numbers or other sensitive personal information. ODE believes it is permitted to review the responsive records in this instance, which consist of more than 2,000 public records requests, to identify and redact such material. She also explained that ODE has no reason to believe that you are unable to pay the fee in this instance because you have paid ODE's processing fees for at least eight public records requests over the last fifteen months, totaling nearly $1,100.00. She also emphasized that the fee is just an initial estimate and acknowledged that ODE must refund the difference if the estimate later proves to be higher than ODE's actual costs.

On the available record, we cannot conclude that the true purpose of ODE's fee estimate was to constructively deny your request. We have no reason to second-guess ODE's representation that it reasonably believes that the responsive records contain material that is exempt from public disclosure. The Public Records Law permits, and in some instances may

require, ODE to identify and redact such information. *See Manual* at 29 – 30 (there are some categories of information that agencies are legally prohibited from disclosing); and ORS 192.338 (requirement to separate exempt and nonexempt material). Ms. Nazarov has adequately demonstrated to us that responding to your request may require several hours of staff time to review more than 2,000 records requests for such material. We also note that your petition does not indicate that you are unable to pay the fee estimate, and the information provided by ODE suggests to us that you have the resources to pay the fee in this instance. Under the circumstances, we are satisfied that ODE's fee estimate is reasonably calculated to recover its actual costs and understand that ODE will refund the difference if the estimate later proves to have been too high.

Because we find that the fee estimate was reasonably calculated to recover ODE's actual costs, we respectfully deny that aspect of your petition asking us to find that the true purpose of the fee estimate was to constructively deny your request. And because ODE has not otherwise denied any aspect of your request, we respectfully dismiss the remainder of your petition as premature. *See* ORS 192.411 (Attorney General's authority is limited to instances in which a state agency has denied a request for records).[2]

Sincerely,

Lisa M. Udland

Lisa M. Udland
Deputy Attorney General

ACF:pjn
c via e-mail: Emily Nazarov (ODE)

[2] Your petition also asks us to order ODE to waive its fees and pay a $200.00 penalty. Those penalties are available only if the Attorney General grants a petition relating to an agency's failure to comply with the requirements of ORS 192.329. *See* ORS 192.407(3). Neither penalty is authorized in this instance because your petition does not assert that ODE has failed to comply with any of the requirements of ORS 192.329.