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

Jeff Myers
8755 SW 165th Ave
Beaverton, OR 97007

Robin Oden
700 Summer Street NE #350
Salem, OR 97301

Re: Petition for Public Records Disclosure Order
*Oregon Department of Education – Early Learning Division*
DOJ File No.: 581070-GA0099-22

Dear Mr. Myers and Ms. Oden:

This letter is the Attorney General's response to Mr. Myers' petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. His petition, which we received October 28, 2022, asks the Attorney General to order the Oregon Department of Education's Early Learning Division (ELD) to disclose various records that he requested on October 9, 2022 and on October 17, 2022. His petition also asks us to order ELD to waive any processing fees and order ELD to pay him a $200.00 penalty. For the reasons that follow, we respectfully grant his petition in part, deny it in part, and dismiss it 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). 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 by which it expects to complete its response based on currently available information. ORS 192.329(5)(b).

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. *See* ORS 192.407(1)(a). The agency carries the burden to sustain its actions. ORS 192.411(1).

The first part of Mr. Myers' petition relates to an October 9, 2022 request to ELD for "electronic copies of Preschool Promise Provider Interest Survey responses for the 2020-21, 2021-22, and 2022-23 school years." ELD acknowledged his request on October 10, 2022 and informed him that it was preparing a fee estimate. ELD contacted him again on October 14, 2022 to inform him that there were no responsive records for the 2020-21 or 2021-22 school years because surveys were not conducted those years, but that staff was still processing the remainder of his request. On October 28, 2022, the fifteenth business day after receiving his request, ELD notified Mr. Myers that it was still working on a fee estimate. His petition followed that same day and asserts that ELD failed to comply with the response time frames established in ORS 192.329. Thereafter, on November 1, 2022, ELD provided him with a fee estimate based upon the nine hours of staff time ELD estimates it will take to process his request. The fee estimate also informed Mr. Myers that ELD anticipates it will be able to complete its response within fifteen business days of receipt of payment.

The record demonstrates that ELD failed to provide the response required by ORS 192.329(5) within the prescribed time frame – specifically, it did not provide Mr. Myers' with "a reasonable estimated date by which [ELD] expects to complete its response based on the information currently available" within fifteen business days of receiving his request. *Id*. ELD has not demonstrated that compliance with this time frame was not required under ORS 192.329, nor has it adequately explained why it took more than three weeks to provide Mr. Myers with a fee estimate. We also observe that this is not the first instance over the last 12 months in which ELD has failed to provide Mr. Myers with the response required by ORS 192.329 within the prescribed time frame. *See, e.g.,* Public Records Order, Jul 1, 2022, Myers; and Public Records Order, Dec 6, 2021, Myers.

ORS 192.407(1)(a) provides that when an agency fails to provide the response required by ORS 192.329 within the prescribed time frame, we are required to treat that failure as a denial of the request. ORS 192.407(3) provides that if we grant a petition filed under that statute, we have discretion to order the disclosure of nonexempt material within seven days, or within any other period we deem appropriate to bring the agency into compliance with ORS 192.329. Subsection (3) also provides that if we grant a petition filed under that statute, we may order the agency to pay a penalty of $200.00 to the requester and may order a fee waiver or fee reduction if the agency responded to the request with undue delay or failed to respond to the request.

Under the circumstances, we grant the first aspect of Mr. Myers' petition in part and order ELD to complete its response to his request within ten business days of receipt of payment. In granting this aspect of his petition, however, the available record does not lead us to find that, to date, there has been undue delay that would authorize us to order ELD to waive its fees or pay a $200.00 penalty. ELD timely acknowledged Mr. Myers' request, provided him with multiple

updates, and has now provided him with a fee estimate and estimated completion time frame. ELD has not actually denied Mr. Myers' request and his petition does not explain how ELD's failure to provide an estimated completion date within fifteen business days resulted in undue delay. We therefore deny Mr. Myers' request that we order ELD to pay a penalty or waive its fees.

The available record does, however, lead us to conclude that ELD's estimated completion time frame of fifteen business days is unreasonably long and may result in undue delay. *See* ORS 192.407(1)(a). ELD's fee estimate reflects nine hours of staff time to complete its response to Mr. Myers' first request, which indicates that ELD intends to commit an average of only three hours per week to his request. Under the circumstances, we do not believe it is reasonable for ELD to commit only three hours per week to a records request that is estimated to take nine hours to process. *Cf*. Public Records Order, Nov 15, 2019, Davis (given the statutory obligation to respond to records requests "as soon as practicable and without unreasonable delay * * * in most instances, it would not be reasonable for a moderately sized agency * * * to commit only two-to-three hours per week to a records request that is estimated to take 21 hours to process."). To ensure that ELD complies with ORS 192.329's processing time frames, we therefore conclude that it is appropriate to order ELD to complete its response to Mr. Myers' October 9, 2022 request within ten business days of receipt of payment of ELD's fee estimate. *See* ORS 192.407(3)(a).

We now turn to the remainder of Mr. Myers' petition, which relates to his October 17, 2022 request. Mr. Myers' petition, which he submitted on the ninth business day after ELD received that request, does not explain the basis for his appeal other than to note that the fifteen-business day deadline is "quickly approaching." In response to Mr. Myers' petition, ELD explained that it provided him with a fee estimate on November 1, 2022, and also informed him that ELD expected to complete its response to that request within five business days of receipt of payment.

Under the circumstances, we must dismiss the remainder of Mr. Myers' petition as premature. ELD has not denied his October 17, 2022 request, nor does the record disclose any reason for us to conclude that ELD has failed to process the request as soon as practicable and without unreasonable delay. *See* ORS 192.411 (Attorney General's authority is limited to instances in which a state agency has denied a request for records). Similarly, Mr. Myers' petition does not allege any violation of ORS 192.329 that would authorize us to order ELD to immediately disclose the records to him, order ELD to waive its fees, or order ELD to pay a penalty. Rather, the record demonstrates that ELD provided him the response required by ORS 192.329 within the prescribed time frame. And ELD's obligation to process Mr. Myers' October 17, 2022 request is currently suspended until it receives payment or ELD waives the fee. ORS 192.329(3)(a).

For the foregoing reasons, we grant the petition as it pertains to Mr. Myers' October 9, 2022 request and order ELD to complete its response within ten business days of receiving payment of the fee estimate. If ELD elects not to comply with this order, it has seven days to announce its intention to seek judicial review. ORS 192.411(2). We respectfully deny the remainder of Mr. Myers' petition as it relates to his October 9, 2022 request. Finally, insofar

as Mr. Myers' appeal relates to his 17, 2022 records request, we respectfully dismiss that aspect of his petition as premature.

Sincerely,

Lisa M. Udland
Deputy Attorney General

ACF:pjn