ELLEN F. ROSENBLUM
ATTORNEY GENERAL

LISA M. UDLAND
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
Telephone: (503) 378-6002

November 15, 2022

Martin Allen Johnson
SID #5410056
777 Stanton Blvd
Ontario, OR 97914

Re: Petition for Public Records Disclosure Order
Oregon Department of Corrections
DOJ File No.: 291200-GA0106-22

Dear Mr. Johnson:

This letter is the Attorney General's response to two petitions for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478, that we received on November 8, 2022. Both petitions relate to records requests you submitted to the Oregon Department of Corrections (ODOC) which were denied because of your inability to pay the associated processing fees. For the following reasons, we respectfully deny both petitions.

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). 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 its actions. ORS 192.411(1).

Agencies may also establish fees reasonably calculated to recover actual costs in making public records available, but "may furnish copies without charge or at 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) and (5). The furnishing of public records primarily benefits the general public when its greatest utility is to the community or society as a whole. *See In Defense of Animals*, 199 Or App 160, 189 (2005). And regardless of how interested the public may be in a particular matter, if the requester fails to demonstrate the ability to meaningfully disseminate the requested information, disclosure will not primarily benefit the general public. *See Attorney General's Public Records and Meetings Manual* at 24 (2019) ("*Manual*").

A requester who believes there has been an unreasonable denial of a fee waiver or reduction may petition the Attorney General for review. ORS 192.324(6). Although there is no provision in the Public Records Law authorizing the Attorney General to review the reasonableness of an agency's fee estimate, 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." *Manual* at 22.

Your first petition relates to a broad, multi-faceted public records request to ODOC on October 26, 2022, for "all records for civil suits, habeas corpus, 42 USC 1983, tort claims, in state and federal courts from 2000 to present, that resulted in declaratory relief, injunctive relief, court orders, damages, settlements, dismissals, [and] jail time credit, against the ODOC." Your request also sought a breakdown of the cost to produce records for each case, including case numbers and page counts.[1] ODOC denied your request and your appeal followed. You assert that the Public Records Law requires ODOC to provide you with an itemized estimate of the cost to respond to your request.

Your second petition relates to a September 28, 2022, request to ODOC for a list of all Oregon aggravated murder sentences since March 2008, for which you also requested a fee waiver. ODOC denied your request for a fee waiver and provided you with a fee estimate of $300.00 to process the request. ODOC also informed you that it was unable to process your request because there are no funds in your trust account to pay the fee and ODOC rules require prepayment from your trust account. Your appeal followed and explains your belief that ODOC's fee estimate is too high. As support for your position, you assert that you received a similar list from ODOC in 2008 for a nominal fee.

In response to your petitions, we contacted Mackenzie Kath in ODOC's Records Unit. With respect to your first petition, she explained ODOC's position that under its rules, Adults in Custody (AICs) must prepay for records requests and that they must have sufficient funds in their trust accounts to cover the cost at the time of the request. *See* OAR 291-037-0035(3). She informed us that at the time of your request, there were no funds in your trust account. And, she explained, ODOC believes the cost to produce records for even a single responsive case would exceed your ability to pay. Under the circumstances, ODOC does not believe it was required to process your request or prepare the estimates you requested.

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[1] According to your petition, you initially submitted a request on September 28, 2022, for a list of cases, case numbers, number of pages for each case, and an index for similar records dating back to 1960. You also requested a fee waiver at that time. ODOC denied your initial request on October 24, 2022, because the Public Records Law does not require public bodies to create new records, such as an index, in response to a public records request and because it did not believe it was required to provide a fee estimate to make public records available in the absence of an actual records request. Your petition does not appear to appeal ODOC's October 24, 2022, determination.

As to your first petition, we note that we addressed a nearly identical fact pattern and set of issues in response to a previous petition filed by you. *See* Public Records Order, Jun 16, 2014, Johnson. In that instance, we concluded that:

> ODOC responded reasonably to your broad request when, rather than generating a specific estimate, it merely noted that the request would easily exceed your ability to pay for records through your inmate trust account. ODOC rules require inmates to pay for public records through their inmate trust accounts. * * * Even generating an estimate of the work required to respond to a request such as yours will take some effort. ODOC was in a position to definitively conclude that you lacked the funds to pay the costs of this request. We do not think the law required it to continue to devote its resources to generating a more specific estimate that you would be unable to pay. We also disagree with your argument that ODOC was required to identify and list responsive documents as part of generating a fee estimate. In fact, the longstanding view of our office is that fee estimates can permissibly include the cost of locating and compiling records.

Id. (Citations omitted.)

We observe that the Public Records Law and ODOC's rules[2] are substantially unchanged from when we issued our prior order. We also find that ODOC is in a position to definitively conclude that you lack the funds to pay for your entire request or any subset thereof. And because the law does not require ODOC to commit resources to calculating fee estimates that it knows you are unable to pay, we conclude that ODOC responded reasonably to your first request. We therefore respectfully deny your first petition.

With respect to your second petition, Ms. Kath informed us that ODOC denied your second request because it determined that you did not qualify for a fee waiver and because you did not have any funds available in your trust account to pay the fee. She also explained that ODOC's initial fee estimate was based upon the four hours of research analyst time, at $75.00 per hour, that ODOC believed it will take to process your request. However, in light of your petition and after additional consultation with its research analysts, ODOC believes it can significantly reduce its fee estimate assuming that your request is limited to the aggravated murder sentences of current AICs. ODOC is preparing a revised fee estimate based upon that assumption and will send it to you shortly.

Under the circumstances, we cannot conclude that ODOC was required to waive its fees. Neither your original request for a fee waiver nor your petition explains how the general public would be the primary beneficiary of the records you have requested. Rather, given the nature of the records you seek, your request seems primarily intended to serve your private interests. And the available record fails to demonstrate that you have any ability to meaningfully disseminate

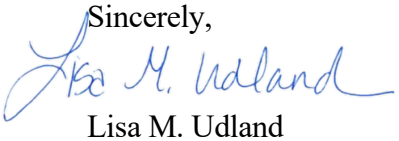
[2] The rule cited in our prior order, OAR 291-037-0020(3)(a) (2014), has been changed to OAR 291-037-0035(3), but it still requires adults in custody to prepay and to maintain sufficient funds in their trust accounts at the time of their public records requests.

the information to the general public. We therefore respectfully deny your petition insofar as you are seeking a fee waiver.

Your petition also asserts that ODOC's initial fee was too high. Although we generally lack the authority to evaluate the reasonableness of ODOC's initial fee estimate, this issue appears largely moot at this time because ODOC has agreed to provide you with a reduced fee estimate.

For the foregoing reasons, we respectfully deny your petitions.

Sincerely,



Lisa M. Udland
Deputy Attorney General

ACF:pjn/
c via e-mail only: Mackenzie Kath (ODOC)