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November 18, 2022

VIA E-MAIL ONLY: sllvolin@gmail.com

Stephanie Volin
29 South Valley Road
West Orange, NJ 07052

Re: Petition for Public Records Fee Waiver and Disclosure Order
Oregon State Bar
DOJ File No.: 993001-GA0105-22

Dear Ms. Volin:

This letter is the Attorney General's response to your petition under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition, which we received November 7, 2022,[1] asks the Attorney General to find that the Oregon State Bar (OSB) unreasonably denied your request for a fee waiver or reduction, that OSB's fee estimate to process a recent public records request is too high, and that OSB's estimated time frame for completing its response to you is unreasonably long. We respectfully deny your petition for the reasons that follow.

a. Background.

Your petition stems from an initial request to OSB for all "records of SB 768 that pertain to OSB's decision to revise ORS 9.705 et seq. * * * meaning, what law group or section or 'law improvement program' first or initially identified that there were 'glitches' in the custodianship statutes, or that there were 'statutory ambiguities' that needed to be 'clarified.'" OSB responded to your initial request by providing you with a fee estimate of $683.14 and informing you that it estimated it would take 25 business days to complete its response upon receipt of payment. You then narrowed the scope of your request to the "earliest record only; i.e., the email or memorandum in which the idea to revise these statutes was first expressed." OSB responded to your revised request by providing you with a fee estimate of $417.01 and again informing you that it estimated it would take 25 business days to complete its response upon receipt of payment. Thereafter, you wrote to OSB's General Counsel, Ankur Doshi, and expressed your belief that the fee estimate to disclose a single record is unacceptably inflated and you requested a fee

[1] We thank you for granting an extension of time in which to respond.

waiver or reduction. Mr. Doshi replied that OSB's fee reflects the reasonable cost estimate to "conduct a search of its files, memoranda, and correspondence in relation to ORS 9.705 *et seq*. and SB 768 to locate responsive records * * * conduct a search on email within its custody to establish which emails are responsive * * * establish the earliest record [and] have counsel review" the record for exempt material. Although Mr. Doshi's response did not directly address your request for a fee waiver or reduction, his reply effectively denied your request.

b. OSB was not required to waive or reduce its fee.

The first part of your petition asserts that OSB has unreasonably denied your request for a fee waiver or reduction. Agencies may 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). Any person who believes there has been an unreasonable denial fee waiver or reduction by a state agency may petition the Attorney General for review. ORS 192.324(6). The agency carries the burden to sustain its actions. ORS 192.411(1).

The record indicates that the first time you requested a fee waiver or reduction was in your letter to Mr. Doshi. Neither that request, nor any of your previous correspondence with OSB, expressed why you believed disclosing this record to you would primarily benefit the general public, which is a necessary condition to be eligible for a fee waiver or reduction. It follows that OSB's denial of your initial request was not unreasonable.

However, to help us evaluate your petition, we invited you to provide support for your belief that your request qualifies for a public interest fee waiver or reduction. In your response, you expressed your belief that "the record will establish and awareness by the OSB that the custodianship it took over former attorney Lori Deveny's law practice in 2018 was improper or illegal; and that the court did not have jurisdiction under the statute at that time." You also asserted that the amendments proposed in SB 768 (2021) were designed to remediate issues that arose in the context of OSB's custodianship over Ms. Deveny's practice. We are also aware that you have been writing about what you have alleged to be OSB's mishandling of that custodianship and understand that you intend to disseminate the substance of the record you seek in an article to be published on the website Medium. Finally, you argued that "[m]atters of public corruption – such as the misconduct at the OSB – are of 'paramount public interest and concern.'"

We contacted Nik Chourey, OSB Deputy General Counsel, regarding your petition. In response to your claims, he expressed OSB's position that the premise of your public interest argument in this instance – i.e., that OSB's custodianship over Ms. Deveny's law practice was improper or illegal – is flawed. As support for OSB's position, he noted that you attempted to intervene when OSB petitioned the Multnomah County Circuit Court for custodianship over Ms. Deveny's law practice. As part of that litigation, you challenged the trial court's jurisdiction over OSB's petition as well as the court's authority to appoint OSB as custodian. The trial court

denied your request to intervene, found that it had jurisdiction over the petition and that it had authority to appoint OSB as the custodian of Ms. Deveny's practice. *See* Order Denying Motion to Intervene and Related Motion, *In the Matter of the Appointment of a Custodian for the Law Practice of Lori E. Deveny* (18CV48680). You appealed the trial court's decision to the Court of Appeals, which affirmed the trial court's decision without opinion. *See In the* Matter *of the Appointment of a Custodian for the Law Practice of Deveny, Lori E. Oregon State Bar v. Volin*, 312 Or App 556, 557 (2021).

After reviewing the relevant cases and researching the legislative history for SB 768, we are not persuaded by your argument that disclosing the requested record to you will primarily benefit the general public. Because it is a settled legal matter that OSB's custodianship of Ms. Deveny's law practice *was not* improper or illegal, there is no reasonable basis for us to conclude that the requested document is likely to show that OSB was aware that its custodianship *was* defective. Moreover, our review of the 2021 amendments to OSB's custodianship statutes, both as proposed by OSB and as enacted, disclosed no changes to those statutes that would have had any bearing on the jurisdictional issues raised by you in the Deveny matter.[2] Thus, we find no support for your contention that OSB's proposed amendments were designed to remediate issues, including alleged misconduct, that arose in the context of that matter. We are also unaware of any general or heightened public interest in the subject of your request that would lead us to find that disclosing this document to you would primarily benefit the general public.[3] We therefore conclude that OSB was not required to grant your request for a fee waiver or reduction in this instance and respectfully deny the first part of your petition.

c. OSB's fee estimate was not calculated to constructively deny your request.

The second part of your petition claims that OSB's fee estimate to produce a single record is inflated. We understand your petition to mean that you believe OSB's fee estimate is improper because you believe it exceeds the actual costs OSB will incur to process your request. *See* ORS 192.324(4). There is no provision in the Public Records Law authorizing the Attorney General to review the reasonableness of an agency's fee estimate or how it was calculated. However, we have interpreted the appeal provisions of 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

[2] Your petition addresses only the 2021 amendment to ORS 9.715 that allows any attorney to petition a circuit court for custodian over another lawyer's law practice whenever that lawyer has died, is disbarred or suspended from the practice of law, is incarcerated or has abandoned their practice. Prior to that 2021 amendment, only OSB could petition for custodianship. Because the 2021 amendment did not change circuit court or OSB authorities under ORS 9.715, there is no apparent connection between the amendment and the propriety of either OSB's custodianship over Ms. Deveny's law practice or the trial court's jurisdiction in that matter.

[3] To the extent the general public may be interested in the 2021 amendments to the custodianship statutes, we observe that considerable information about the amendments, including their intended purpose, is publicly available in various OSB Board of Governors meeting minutes (https://www.osbar.org/leadership/minutes/toc.html), as well as in the legislative materials relating to SB 768 that can be viewed in the Oregon Legislative Information System (https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/SB768).

than to recoup the agency's actual costs." *Attorney General's Public Records and Meetings Manual* at 22 (2019). Such an evaluation typically requires the agency to explain how it calculated its fee. *Id*.

Your petition expresses your belief that the single record you seek is either readily available or easily locatable. Mr. Chourey explained OSB's position that that this is not the case. He also denied that OSB's fee was inflated or calculated to constructively deny your request, and provided us a breakdown of OSB's fee calculation. He explained that the initial fee was based OSB's estimate that it will require four hours of staff time to search for and gather responsive records from its paper files, electronic records, and e-mails, plus five hours of attorney review to identify and redact exempt information. He explained OSB's position that to process your revised request, the four hours of search time would be the same, but the estimated amount of attorney review time to identify the single responsive document and review it for exempt information was reduced to two hours.

Given the particular nature of your request, it is reasonable to anticipate that processing it will entail several hours to locate and manually review potentially responsive records to first determine whether they are actually responsive and, if so, when they were created. There is no evidence that OSB deviated from its standard procedures for calculating its fee and given our inferior knowledge of how OSB's records are stored and retrieved, we do not see any objective basis to believe that the staff time quoted by OSB was calculated to deny your request rather than recover its actual costs. OSB has also acknowledged that it must refund any overpayment if the estimate later proves to have been too high. Under the circumstances, we cannot conclude that the true purpose of OSB's fee estimate was to constructively deny your request. We therefore deny the second part of your petition.

Mr. Chourey has informed us, however, that OSB has agreed to revisit its fee estimate, and in particular the charge for two hours of attorney time. *See In Defense of Animals v. OHSU,* 199 Or App 160, 182–83 (2005) (fees were not reasonable where OHSU could not justify why professional staff were needed to redact basic information such as company names); and ORS 192.324(4)(b) (public records fees may not include cost of time an attorney spends determining the application of the public records law).

d. OSB has not acted with undue delay.

Both of the fee estimates you received included an estimate that it would take OSB up to 25 business days to complete its response. Your petition asserts that it should not take that long to process your request for a single record.

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 the requester with "a reasonable estimated date by which the public body expects to complete its response based on the information currently available." ORS 192.329(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 petition the Attorney General if they believe the

agency has failed to comply with the response timeframes contained in ORS 192.329(5) or if they believe the estimated completion time frame provided by the agency under ORS 192.329(5) is unreasonably long and will result in undue delay of disclosure. ORS 192.407(1).

Your petition does not assert that OSB has failed to respond to your request as soon as practicable and without unreasonable delay or that OSB has failed to comply with the processing time frames contained in ORS 192.329. Given that OSB's obligation to process your request is currently suspended, the available record discloses no reason for us to conclude that, to date, OSB has acted with undue delay or failed to comply with the statutory response time frames.[4]

Next, we turn to your contention that it should not take OSB 25 business days to process your request for a single record. Given the statutory obligation to process requests "as soon as practicable and without unreasonable delay," we generally agree that in most instances, it would not be reasonable to expect that it will take an agency 25 business days to respond to a request that is estimated to take only six hours of staff time to process. However, we conclude that we do not have the authority to order OSB to revise its estimate in this instance.

Under ORS 192.407(1), we may consider claims that an estimated completion date provided by an agency under ORS 192.329(5)(a) is unreasonably long and likely to result in undue delay. In this instance, however, OSB has not yet provided you with the estimated completion date required by ORS 192.329(5)(b). OSB's obligation to provide that estimate is currently suspended and it is not feasible for OSB to calculate an estimated completion date until it begins processing your request. The completion time frame that OSB provided to you was not the reasonable estimated completion date required by ORS 192.329, nor was OSB required to provide it under the Public Records Law. It is therefore not subject to our review under ORS 192.407(1). We note, however, that upon receipt of payment or waiver of its fee, OSB must either provide you with a reasonable estimated completion date based on the information available at that time or complete its response to your request in short order. *See* ORS 192.329(5).

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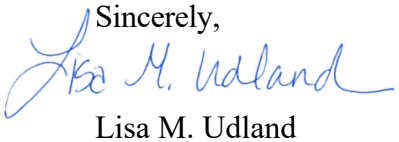
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[4] OSB acknowledged your initial request and provided its initial fee estimate within seven business days. OSB's obligation to process that request was suspended at that time pending receipt of payment. ORS 192.329(3)(a). A week later, you narrowed your request to the single record at issue, effectively withdrawing your initial request. OSB provided you with a revised fee estimate within four business days of receiving your revised request, again suspending its obligation to process your request until the fee is paid or waived.

e. Conclusion.

For the reasons discussed above, we conclude that OSB did not unreasonably deny your request for a fee waiver or reduction, OSB's fee estimate was not a constructive denial of your request, and that OSB has not acted with undue delay in this instance. We also conclude that we lack the authority at this time to order OSB to revise the estimated completion time frame it provided to you. We therefore respectfully deny your petition.

Sincerely,



Lisa M. Udland
Deputy Attorney General

ACF:pjn
c via e-mail only: Nik Chourey (OSB)