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October 10, 2023

VIA E-MAIL ONLY: jcortright@gmail.com

Joe Cortright
No More Freeways PDX
1424 NE Knott St.
Portland, OR 97212

Re: Petition for Public Records Fee Waiver
Oregon Department of Transportation
DOJ File No.: 731020-GA0148-23

Dear Mr. Cortright:

This letter is the Attorney General's response to your petition, submitted on behalf of No More Freeways PDX (NMF), under the Oregon Public Records Law, ORS 192.311 to 192.431. Your petition asks the Attorney General to find that the Oregon Department of Transportation (ODOT) has unreasonably denied NMF's request for a public interest fee waiver to produce correspondence relating to a subcontractor on the Rose Quarter project. For the reasons discussed below, 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). Agencies may establish fees reasonably calculated to recover actual costs in making public records available, but "may furnish copies without charge or 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)–(5). Even if waiving or reducing the fee is in the public interest, agencies have discretion whether or not to grant such waivers or reductions. *See In Defense of Animals v. OHSU*, 199 Or App 160, 189 (2005). However, an agency's decision to deny a fee waiver or reduction must be reasonable under the totality of the circumstances. *Id*. at 190. Any person denied a 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 decision. ORS 192.411(1).

Your petition stems from a request to ODOT for a "copy of the subcontract between Mott-McDonald and MPM Consulting, and any communications between ODOT, Mott-McDonald and MPM related to this contract." You also requested ODOT waive any fees associated with the request, arguing that disclosure will help inform the public about the nature and impacts of ODOT projects and activities.

ODOT responded by informing you that it does not possess a copy of the subcontract and by providing you with a fee estimate for the 32 hours of work ODOT anticipates it will take to process the remainder of your request. ODOT also asked you to clarify the public interest in the disclosure of the specific records you requested; i.e., all communications relating to the subcontract. You responded by arguing:

> The Rose Quarter is one of the most expensive projects in ODOT history at $1.9 billion, and its cost has quadrupled in six years. NMF, and Oregon citizens have a right to full access to any accounting work done on this expensive project, including especially work done by a forensic accountant in the amount of $300,000.

In light of this additional information, ODOT denied your request for a fee waiver but approved a 20% fee reduction. ODOT also informed you that Mott-McDonald subcontracted with MPM Consulting to provide project scheduling support, not accounting work, and that there are no forensic accounting contracts associated with the Rose Quarter project. ODOT also explained its decision to deny your request for a fee waiver:

> This decision was made based on several factors, including the character of the public interest in these particular records that you articulated in your fee waiver request * * *. Per your email, the character of the public interest for these requested documents relates to the project cost. ODOT has already published or made available Rose Quarter project cost information on an ongoing basis (including a description of the project cost increases), in multiple publicly available records such as the 2020 Cost to Complete Report, the September 2021 Oregon Transportation Commission meeting presentation, and the 2023 Urban Mobility Strategy Finance Plan. A list of all Rose Quarter project expenditures was also provided to you at no cost last month * * *. It also appears that the requested records relate to a different subject matter than you had anticipated, since MPM Consulting is not a forensic accounting firm * * *. In addition, the scope of your request for "any communications between ODOT, Mott-MacDonald and MPM related to this contract" is broad, and not limited to a particular subject matter or date range. It will require a search of a large number of project communications in order to identify the requested communications, and review of records found, which is time and labor intensive (32 hours). * * * Considering the totality of circumstances, we have determined that, in this instance, a full waiver of fees is not reasonable; however, a 20% reduction in fees is warranted.

Your appeal followed and expressed your belief that disclosing these communications will be of great public interest because the cost of the Rose Quarter project has quadrupled over the last several years. You assert that the "reasons for these huge cost overruns are unclear, and ODOT's decision to hire, via a contractor, a forensic accountant specializing in fraud, for $300,000 is of great relevance to this question." You also argue that the Oregon Transportation Commission (OTC) is "considering authorizing additional tens of millions of dollars to study this project, with no accountability for how much has been spent to date."

We conferred with Megan Channel, ODOT Rose Quarter Project Director, regarding your petition. She explained ODOT's position that your public interest arguments are based on inaccurate information. Specifically, she explained, ODOT did not hire MPM Consulting and did not direct Mott-McDonald to subcontract with the firm. She also explained that MPM Consulting is only performing project scheduling support to Mott-McDonald that that the firm is not performing any accounting work. She noted that although there is an American firm named MPM Consulting LLC that conducts forensic accounting, that particular firm is not associated with the Rose Quarter project. Accordingly, she explained, communications relating to this subcontract are not likely to shed any light on the public interests identified in your petition; i.e., Rose Quarter project costs or accounting. Finally, in response to your claim that the OTC may authorize significant additional funds towards the Rose Quarter project, she explained that OTC is not currently considering additional funds to study the project beyond the $158M it approved during its June 28, 2023 meeting, as documented in the OTC's recently published Urban Mobility Strategy Finance Plan.

Because ODOT determined that disclosing these records to you would be in the public interest, we must determine whether its decision to reduce its fee by 20%, but deny your request for a complete waiver, was reasonable under the totality of the circumstances. When evaluating requests for a fee waiver or reduction, we have determined that agencies should consider "(1) the character of the public interest in the particular disclosure, (2) the extent to which the fee impedes that public interest, and (3) the extent to which a waiver would burden the public body." *Attorney General's Public Records and Meetings Manual* at 24 (2019).

In this instance, we find that ODOT considered the appropriate factors and conclude that ODOT did not unreasonably deny your request for a fee waiver. The breadth of your request for all communications related to the subcontract means that considerable time may be spent compiling and reviewing records completely unrelated to any matter of public interest. More importantly, because we have no reason to second guess Ms. Channel's representation that MPM Consulting is not performing accounting work related to the Rose Quarter project, we find that disclosure of the records you seek is not likely to inform the public interests you have identified in any meaningful way. For similar reasons, it follows that ODOT's fee is not likely to impede any of the public interests that you have articulated. We also find ODOT's 20% fee reduction to be reasonable in this instance given what we perceive to be the public's heightened interest in the Rose Quarter project generally. However, we are not aware of any public interests in the specific communications you seek that would justify the burden ODOT would incur if we were to order a complete waiver of fees.

Because we find that ODOT did not unreasonably deny your request for a full waiver of fees, we respectfully deny your petition.

Sincerely,

Lisa M. Udland

Lisa M. Udland
Deputy Attorney General

ACF:pjn
c via e-mail only: Megan Channel (ODOT)