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VIA E-MAIL ONLY: kendavispdx@gmail.com and james.s.owens@odfw.oregon.gov

Re: Petition for Public Records Disclosure Order
Oregon Department of Fish and Wildlife
DOJ File No.: 635010-GA0040-24

Dear Mr. Davis and Mr. Owens:

This letter is the Attorney General's response to Mr. Davis' petition for the disclosure of records under the Oregon Public Records Law, ORS 192.311 to 192.478. His petition, which we received April 15, 2024,[1] asks the Attorney General to find that the Oregon Department of Fish and Wildlife (ODFW) has failed to respond to a record request within the timeframes prescribed by the Public Records Law. For the reasons that follow, we grant Mr. Davis' 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). 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 15 business days of receiving a written request is required to provide the requester with a reasonable estimated completion date. ORS 192.329(5). A requester may petition the Attorney General if they believe an agency has failed to comply with the processing timelines and other provisions contained in ORS 192.329. ORS 192.407(1). An agency's failure to provide a response required by ORS 192.329 within the prescribed timeframe shall be treated as a denial of the request, unless the agency can demonstrate that compliance was not required under ORS 192.329. ORS 192.407(1)(a). The agency carries the burden to sustain its actions. ORS 192.411(1).

Mr. Davis' petition relates to a 19-part record request that he submitted to ODFW on February 6, 2024, seeking information about the administration of the elk damage hunting tag program in communities along the north coast of Oregon over the last five years. He also requested a public interest fee waiver or reduction, contending that disclosure would help the

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

public evaluate the propriety of ODFW's actions in administering the elk reduction program. ODFW acknowledged Mr. Davis' request on February 15, 2024, but noted that:

> Due to resource constraints resulting from a key public records staff vacancy and an increased volume of public record requests, the Department anticipates it will take longer than normal to process many public records requests for the foreseeable future. The Department is working as expeditiously as possible to increase staffing levels, and will strive to meet the statutory deadlines for either completing our response or providing you with an estimated completion date within 15 business days of your request. However, depending upon the nature of your request, for the reasons described above, it may be impracticable for the Department to comply with those deadlines. In such cases, we will nevertheless complete our response as soon as practicable and without unreasonable delay upon the availability of staff, and in compliance with ORS 192.329(6) and (8).

According to Mr. Davis, as of the date of his petition, he has not received an estimated completion date or any further correspondence from ODFW.

In response to Mr. Davis' petition, on April 17, 2024, ODFW provided him with a fee estimate for the approximately 100 hours ODFW estimates it will take to locate, review, and disclose nonexempt records. ODFW also acknowledged at that time that it was still considering Mr. Davis' request for a public interest fee waiver or reduction and that it expects to inform him of its decision by May 3, 2024.

The record demonstrates that ODFW did not respond to Mr. Davis' request as required by ORS 192.329 within the prescribed timeframe; specifically, ODFW failed to provide him with a reasonable estimated completion date within 15 business days. And although ODFW has informed us that its ability to process public record requests is currently hampered by limited resources, ODFW has not demonstrated why compliance with the prescribed timeframe was impracticable in this instance for one of the reasons listed in ORS 192.329(6).[2]

Under the circumstances, we are required to treat ODFW's failure to timely respond to Mr. Davis as a denial of his request. ORS 192.407(1)(a). And when an agency fails to comply with ORS 192.329, we have discretion to order the disclosure of nonexempt material within any timeframe we deem appropriate to bring the agency into compliance with ORS 192.329. ORS 192.407(3). In light of the two-month delay in ODFW's response, we elect to exercise that discretion in this instance and grant Mr. Davis' petition.

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[2] ORS 192.329(6) states that the timeframes prescribed by ORS 192.324 and 192.329(5) do not apply if compliance would be impracticable because (a) the staff necessary to complete a response to the public records request are unavailable; (b) compliance would demonstrably impede the agency's ability to perform other necessary services; or (c) because of the volume of public records requests being simultaneously processed by the public body. An agency cannot comply with the prescribed timeframes is still required to acknowledge the request and complete the response as soon as practicable and without unreasonable delay. ORS 192.329(8).

In determining an appropriate timeframe for disclosure in this case, we note that ODFW currently estimates that it will take at least 100 hours to locate and review the responsive records. ODFW also represents it can devote an average of 10-15 hours per week to processing the request, with an estimated completion timeframe of 6-8 weeks from receipt of payment of its processing fees. ODFW has also agreed to furnish nonexempt records to Mr. Davis on a rolling basis as they become available.

Given the large volume of records requested and the considerable amount of time it will likely take to process them, we find ODFW's expected commitment of 10-15 hours per week to the request and its willingness to furnish nonexempt records on a rolling basis to be reasonable. *See* Public Records Order, Nov 24, 2021, Anderson (a commitment of 8 to 10 hours per week was reasonable given the size and scope of the request). We also find ODFW's estimated completion timeframe to be reasonable and unlikely to result in the undue delay of disclosure. We therefore adopt ODFW's estimate and order the department to complete its response to Mr. Davis within 8 weeks of receipt of payment.

We also find that, measured from the date of Mr. Davis' original request, there is no timeframe that we can adopt that would effectively bring ODFW into compliance with the requirements of ORS 192.329. In light of that, we believe that further relief to Mr. Davis is appropriate. As a result, and taking into account what we observe to be heightened public interest in the elk damage hunting tag program, we exercise our authority under ORS 192.407(3) and order ODFW to reduce its fee estimate by at least 30% in this instance.

For the foregoing reasons, we grant Mr. Davis' petition and order ODFW to reduce its fee estimate by at least 30% for failing to timely respond to the request. We also order ODFW to complete its response to Mr. Davis within 8 weeks of either receiving payment or waiving the remainder of its fee. We also expect that ODFW will produce nonexempt records to Mr. Davis on a rolling basis as they become available. If ODFW elects not to comply with this order, it has seven days to announce its intention to seek judicial review. *See* ORS 192.407(3) and 192.411(2).

Sincerely,

Lisa M. Udland

LISA M. UDLAND
Deputy Attorney General

ACF:pjn