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

June 20, 2024

VIA E-MAIL ONLY: rob.davis@propublica.org

Re: Petition for Public Interest Fee Waiver
Oregon Department of Corrections
DOJ File No.: 291200-GA0058-24

Dear Mr. Davis:

This letter is the Attorney General's response to your petition, on behalf of ProPublica, for a fee waiver under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition asks the Attorney General to order the Oregon Department of Corrections (ODOC) to waive all fees associated with the cost of processing a six-part public records request. For the reasons that follow, we respectfully dismiss your petition in part and deny it in part.

Your petition stems from an April 29, 2024 request that sought, in part, all letters sent from prison term analysts to various entities since 2019 providing notice of errors in judgments that affected sentence computations. ODOC responded by informing you that it would take hundreds of hours to process that part of your request and asking you to narrow the search parameters to reduce the cost. ODOC also informed you that it did not possess records responsive to the remainder of your initial request. Thereafter, you submitted a revised request seeking (1) all e-mails to or from analysts in ODOC's Offender Information & Sentence Computation Unit (OISC) from 2019 to present that contain specified search terms; (2) the metadata for a particular OISC organizational e-mail account from June 30, 2023 to present; (3) a list of all forms used by OISC; (4) all OISC documents relating to three adults in custody (AICs); (5) the data dictionary for the Criminal Information System database; and (6) ODOC's public records request logs from 2019 to present. You also requested a public interest fee waiver asserting that disclosure will primarily benefit the general public because the public has no other way to learn how ODOC analyzes prison terms from plea deals or enforces other statutory requirements around sentencing. ODOC subsequently informed you that it approved a fee reduction and provided you with a fee estimate of $538.00, representing the approximately 19.25 hours ODOC estimated it would take to process your six-part request. Your appeal followed.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. ORS 192.314(1). Agencies may establish fees reasonably calculated to recover their actual cost in making records available for inspection,

but may waive or reduce their fees on a case-by-case basis if doing so "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 a waiver or reduction. *In Defense of Animals v. OHSU*, 199 Or App 160, 189 (2005). However, if disclosure is in the public interest, an agency's decision to deny a request for a fee waiver or reduction must be reasonable under the totality of the circumstances. *Id*. at 190. Any person who believes a state agency has unreasonably denied a request for a fee waiver or reduction may petition the Attorney General to evaluate whether the denial was reasonable under the circumstances; i.e., within the range of determinations that the law allows. *See id*. at 189; and ORS 192.234(6).

Your petition asserts that ODOC's fee estimate is unreasonable, unnecessary, and calculated in bad faith because you do not believe it will take ODOC more than 19 hours to process your request. Your petition also expresses your belief that ODOC reduced its fee by only 2% ($16.00), which you believe is unreasonable in light of a similar scenario in which our office concluded a 20% fee reduction was reasonable. *See* Public Records Order, Sep 5, 2017, Woodworth. In support of your claim that disclosure will primarily benefit the general public, you state that you intend to inform the public about how ODOC handles the terms of plea deals that are agreed upon in court. You assert that on multiple occasions, ODOC has prolonged the sentences of AICs without notifying the AICs because a prison term analyst found an error or a purported error in a plea deal. You state that you have repeatedly asked ODOC about how often this happens, but that ODOC has not responded to your queries.

We discussed your petition with Michelle Dodson, ODOC's Records Manager. First, she acknowledged that ODOC determined that disclosure in this instance would be in the public interest. However, she explained, ODOC did not grant a complete waiver because of the burden of processing your six-part request, because ODOC does not believe the reduced fee is likely to impede the public interest in the records you seek, ODOC concluded that disclosing some of the requested records (e.g., 5 years of the public records logs) will not meaningfully inform the public interests you identified, and because ODOC has no reason to believe ProPublica is unable to pay the fee. She also expressed ODOC's position that the premise of your public interest argument is inaccurate because when computing sentences, ODOC does not ordinarily review plea agreements. Rather, ODOC reviews court judgments and if it identifies defects in a judgment, it notifies the court and the parties so that they can take appropriate corrective action.

Ms. Dodson also clarified that ODOC did not reduce its fee estimate by only 2%. In addition to waiving the first half hour of processing time, she indicated that ODOC granted a 20% fee reduction according to the reduced fee rates specified in the DAS Statewide Policy on Fees. *See Public Records Requests Fees and Charges*, Policy #107-001-030 (Feb 15, 2017). In other words, she explained, ODOC reduced its initial fee estimate by $138.50 (from $676.50 to $538.00). She also informed us that ODOC misinterpreted your request for a list of OISC forms when preparing its estimate and has now determined it can disclose that list without charge. And after discussing your petition with Ms. Dodson, ODOC has also agreed to waive the portion of its fee estimate associated with cost of processing your request for e-mails, which constituted nearly half of ODOC's original estimate. ODOC has therefore recalculated its reduced fee

estimate to be $202.00, representing the 9.25 hours ODOC now estimates it will take to process the remaining parts of your request.

Finally, Ms. Dodson provided us with a breakdown of how ODOC calculated its revised estimate. For example, the reduced fee estimate for the OISC records is $38.00, representing 1.5 hours to locate and gather records and 15 minutes of management review. The reduced fee estimate for ODOC's public records logs is $132.00, which represents an estimated 6 hours to gather and review records from each ODOC institution across the state. Finally, Ms. Dodson noted that the fee is just an estimate and that ODOC will refund any overpayment if the estimate is later determined to have exceeded ODOC's actual costs.[1]

Because ODOC determined that disclosing the remaining records to you would be in the public interest, we must determine whether its decision to reduce its fee by only 20% was reasonable under the totality of the circumstances. Because the Public Records Law grants agencies discretion with respect to waiving and reducing fees, we do not ask whether our office would have made the same decision in this instance. Rather, we may only assess whether ODOC exercised its discretion "within the range of lawful options available to it under the relevant law." *In Defense of Animals*, 199 Or App at 189. When exercising this discretion, we have concluded that agencies should consider: (1) the character of the public interest in the particular records; (2) the extent to which the fee impedes the public interest; and (3) the extent to which waiver or reduction would burden the agency. *Attorney General's Public Records & Meetings Manual* 24 (2019). Facts typically relevant to this evaluation include how narrowly tailored the request is to a matter of public interest; the time and expense needed to fulfill the request; the volume of the records requested; the need to segregate exempt from nonexempt materials; whether the fee was avoidable; and the ability of the requester to pay the fee. *Id*.

In this instance, we find that ODOC considered the appropriate factors and conclude that its decision to grant a 20% fee reduction for the remaining records was reasonable. In reaching this conclusion, we note that the remaining parts of your request do not appear to be narrowly tailored to the public interest you identified; ProPublica has not indicated that it is unable to pay the fee; and the amount of the fee, in relation to the volume of records requested, does not appear to be so great that it will meaningfully impede any interest the general public may have in those records. We therefore conclude that ODOC did not unreasonably deny your request for a fee waiver as to the remaining records.

//

//

//

[1] ODOC's combined fee estimate includes another $32.00 for the additional 1.5 hours of managerial processing time ODOC estimates it will take to complete its response to your entire request, with the first half hour waived. According to Ms. Dodson, ODOC's fee estimate does not include any costs for processing your request for the 2023 metadata for an OISC e-mail account because that account was not active in 2023. She also explained that ODOC has already informed you that it does not possess any records responsive to your request for a data dictionary.

In conclusion, we dismiss as moot those portions of your petition relating to the records that ODOC has now agreed to furnish you at no charge. We respectfully deny your petition as to the fees for the remaining records because we conclude ODOC did not unreasonably deny your request for a complete waiver of the fees associated with producing those records.

Sincerely,

Lisa M. Udland

LISA M. UDLAND
Deputy Attorney General

ACF\pjn
c via e-mail only: Michelle Dodson (ODOC)