ELLEN F. ROSENBLUM
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LISA M. UDLAND
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DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
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October 17, 2024

VIA E-MAIL ONLY: 10cmangum@gmail.com

Chad D. Mangum
317 E 830 S
Farmington, UT 84205

Re: Petition for Public Records Fee Waiver
Oregon Board of Tax Practitioners
DOJ File No.: 119001-GA0106-24

Dear Mr. Mangum:

Enclosed is a corrected version of the Public Records Order e-mailed to you on October 15, 2024. The original order stated, in part, that "the Board believes you seek this material primarily for work-related purposes because you are an out-of-state preparer of Oregon tax returns and *because you submitted these requests only after the Board contacted you regarding your licensure status*." (Emphasis added.) After the original order was sent to you, we learned from both you and the Board that the italicized portion of this statement is inaccurate. The Board confirmed that it did not contact you prior to receiving your records requests, and also confirmed that its denial of your fee waiver requests was not based on this error. The corrected version of the order accurately reflects the Board's position.

Although we regret the error, it does not affect our determination that the Board did not unreasonably deny your fee waiver requests.

Sincerely,

Lisa M. Udland

LISA M. UDLAND
Deputy Attorney General

ACF:pjn
Enclosure
c via e-mail only: Laura Kardokus (Oregon Board of Tax Practitioners)

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DOJ File No.: 119001-GA0106-24

Dear Mr. Mangum:

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 asks the Attorney General to find that the Oregon Board of Tax Practitioners (the "Board") unreasonably denied your requests for a waiver of fees associated with processing two public records requests. We respectfully deny your petition for the reasons that follow.

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). Even if waiving or reducing a 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 there has been an unreasonable denial of 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 actions. ORS 192.411(1).

Your petition stems from two records requests submitted by you on October 3, 2024 and October 4, 2024, respectively. Your first request sought records pertaining to the requirement that out-of-state tax preparers obtain Oregon licensure before preparing Oregon tax returns, including (1) any legal opinions, statutory references, or internal memoranda that provide the

legal basis for this licensing requirement; (2) any correspondence between the Board and the Attorney General's Office regarding this requirement; and (3) documents or records that the Board relied upon when issuing guidance about this requirement on its website. In support of your request for a fee waiver, you stated that the requested records pertain to the scope of Oregon's regulatory authority and the imposition of state licensing requirements on out-of-state tax professionals. You argue that this issue affects many tax preparers across the country and may impact the cost and accessibility of tax preparation services for Oregon residents.

Your second request sought (1) a recent settlement agreement between H&R Block and the Board relating to the licensing of out-of-state tax preparers; (2) correspondence and communications between the Board and H&R Block related to the settlement; (3) any legal opinions or internal memorandum regarding the enforcement or interpretation of Oregon licensing laws as they pertained to the settlement; (4) any administrative orders or rulings issued in connection with the case; and (5) any other pleadings, filings, or related documents. In support of your request for a fee waiver, you stated that the Board's attorney cited this settlement agreement as pivotal in the Board's interpretation and enforcement of Oregon's licensing requirements for out-of-state tax preparers.

The Board denied your fee waiver requests on October 8, 2024, noting that it is not aware of any heightened public interest in the materials you requested. The Board also explained that processing your requests will be burdensome and costly because the Board has only two employees, many of the records you seek will need to be reviewed by an attorney for privileged material, and because the Board has a limited budget. Your appeal followed.

We discussed your petition with Laura Kardokus, the Board's Executive Director. She explained the Board's position that you do not qualify for a public interest fee waiver because it does not believe that disclosure to you will primarily benefit the general public. Rather, the Board believes you seek this material primarily for work-related purposes because you are a licensed out-of-state preparer of Oregon tax returns and you have questioned the state's authority to require licensure for preparers such as yourself. Ms. Kardokus also asserted that neither your requests nor your petition demonstrates your ability to meaningfully disseminate the information to the general public. *See Attorney General's Public Records and Meetings Manual* at 24 (2019) ("*Manual*") (if the requester fails to demonstrate the ability to meaningfully disseminate the information, disclosure will not primarily benefit the public).

Regarding your first request, Ms. Kardokus stated that the Board is not aware of any broad or heightened interest among the general public in the Board's authority to require licensure of out-of-state tax preparers. She also noted that the Board has already provided you with significant information about these requirements, including a six-page letter from the Board's attorney identifying the various statutes and rules that govern the Board's authority and Oregon licensing requirements. In light of the information already furnished to you, the Board does not believe that disclosing the additional material you seek will meaningfully contribute to the public's understanding of this topic. Regarding your second request, Ms. Kardokus indicated that the Board is not aware of any heightened public interest in the H&R Block settlement agreement, which the Board has already furnished to you. As the Board's attorney described to you in her cover letter, the settlement was provided to you simply an indication of how the

applicable laws and rules provided to you were previously applied to a business that uses out-of-state employees to prepare Oregon tax returns.

Ms. Kardokus also explained that even if disclosing this material to you would primarily benefit the general public, the Board would exercise its discretion to deny your fee waiver requests. She indicated that the Board has already expended significant resources addressing and responding to your inquiries about Oregon's licensing requirements. She also noted that many of the materials you seek contain privileged communications that will likely require a costly review by the Board's attorney, costs for which the Board may not be able to seek full reimbursement from you. *See* ORS 192.324(4)(b) (agency's fee may include cost of an attorney in reviewing and segregating nonexempt records for disclosure, but the agency's fee may not include the cost of an attorney in determining the application of the Public Records Law). In this instance, Ms. Kardokus estimates it will take approximately 40 hours, including 10 hours of attorney review, to process your requests, which represents a significant commitment of resources for an agency with only two employees.

Because Ms. Kardokus has indicated that the Board would exercise its discretion to deny your fee waiver requests, we do not need to address the threshold issue of whether you are eligible for a public interest fee waiver under ORS 192.324(5). Instead, we evaluate whether the Board's fee waiver denials were reasonable under the totality of the circumstances. In making this determination, we do not ask whether our office would have made the same decision in this instance; rather, we may only assess whether the Board 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 a waiver or reduction would burden the agency. *Manual* at 24. 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*.

After discussing your petition with Ms. Kardokus, we find that the Board appropriately considered these factors and conclude that the Board's refusal to waive its fees was not unreasonable in this instance. First, we do not perceive any widespread public interest in understanding these out-of-state tax preparer licensing requirements. And because the Board has already furnished you with a detailed description of the Board's authorities and Oregon's licensing requirements, we cannot conclude that the additional material you seek will meaningfully advance the public's understanding of this topic. Given the nature and volume of records to be reviewed, we also expect that the Board will spend much time reviewing records that are exempt from disclosure or completely unrelated to any matter of interest to the general public. As a result, we think that any public interest in the particular materials you seek is significantly diminished, and the marginal value of disclosing it would not justify the significant burden the Board would incur if we ordered it to waive its fee. We also find that the Board has adequately explained the factors contributing to its fee and given the volume and character of records you specifically requested, it does not appear the costs the Board will incur are avoidable. Under the totality of the circumstances, we cannot conclude that the Board's fee will

impede the public interest in learning about Oregon's licensing requirements for out-of-state tax professionals. We therefore conclude that the Board did not unreasonably deny your fee waiver requests in this instance and respectfully deny your petition.

Sincerely,

LISA M. UDLAND
Deputy Attorney General

ACF:pjn
c via e-mail only: Laura Kardokus (Oregon Board of Tax Practitioners)