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May 17, 1999

Bruce E. Smith
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P.O. Box 1147
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Re: *Petition for Public Records Disclosure Order and Review of Denial of Fee Waiver: Housing and Community Services Department Records*

Dear Mr. Smith:

This letter is the Attorney General's order on your petition for disclosure of records and for a waiver of fees under Oregon's Public Records Law, ORS 192.410 to 192.505.[1] In your petition, which we received on May 3, 1999,[2] you ask the Attorney General to direct the Housing and Community Services Department (HCSD) to produce copies of the "low income housing tax credit records described on Exhibit A," which listed the following:

1. The name of each project and the project's developer which have received federal low income housing tax credit allocations each year since 1986 (hereinafter "project").

2. The dollar amount of tax credits allocated to each project and the dollar amount of equity capital that each tax credit award yielded. This information must be provided on individually identified and named projects.

3. The dollar amount of any other government grants and loans attached to each specific project.

4. The total cost for each project with the number of low income housing tax credit units within each project.

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[1] The petition was filed on behalf of your client, Guard Publishing Company, dba The Register-Guard.
[2] We appreciate your extending the time within which the law would have otherwise obligated us to respond.

Your petition also asks the Attorney General to determine that HCSD should furnish the records without charge or at a substantially reduced fee. For the reasons that follow, we respectfully deny your petition to order disclosure or to order a waiver or further reduction of fees.

1. Background

This matter began with a letter dated February 9, 1999, from Diane Dietz, a special projects reporter with The Register-Guard, to Bob Repine, Director of HCSD. In her letter, Ms. Dietz identified 17 aspects of HCSD's Low Income Housing Tax Credit Program and, except for a few specific documents, requested generally that HCSD provide her with any documents, notes, directives or e-mails containing information about those subjects.

Mr. Bob Gillespie, Manager of HCSD's Housing Resource Section, responded to Ms. Dietz in a five-page letter dated February 23, 1999, which described the types of records, if any, maintained by HCSD that might be responsive to each request, identified any exemptions from disclosure under the Oregon Public Records Law that would apply to the records, commented upon whether the records would be likely to contain meaningful information, and estimated HCSD's charges for providing the records specific to each request. Noting that the scope of her request might be larger than intended, Mr. Gillespie suggested that Ms. Dietz may want to focus on more material sources so as to avoid some of the estimated costs, which ranged from only the (unspecified) copying costs for some items to $35,000 for another item that would require assembling, copying and replacing files on 553 applications with approximately 280,000 pages of material. Mr. Gillespie closed his letter by asking Ms. Dietz how she wished to proceed.

On March 10, 1999, Ms. Dietz responded to Mr. Gillespie with a "refashioned" records request that significantly reduced its scope. Stating that she had tried to frame the request so it would not require costs beyond those for reproduction, Ms. Dietz added that to further reduce costs she would gladly inspect the records at HCSD's Salem office and make the copies herself. No prepayment of costs was tendered with her letter.

Mr. Gillespie responded by letter dated March 23, 1999, noting that the projected time and expense for HCSD to respond to the revised request was still quite extensive. He explained that the costs outlined in his earlier letter were based on reasonable estimates for HCSD's time and expense and calculated on its standard fee schedule. Mr. Gillespie also addressed the feasibility of Ms. Dietz's offer to inspect the original records and to make her own copies. He observed that the records still would need to be aggregated from numerous files and that exempt materials would need to be redacted, which was a significant part of the costs. He also explained that in order to maintain file integrity he was only willing to allow staff to handle and copy files and that he would not permit files to be taken off the premises. As for the specific information requested, Mr. Gillespie explained that some records were more readily available and would be provided at no cost; some information would need to be compiled from various files, which would require prepayment of $1952; other items would require HCSD to create new documents, but could be provided upon payment of $406 or $588, depending upon whether it was done in

conjunction with the other requests; and certain items would not be provided as they were exempt from disclosure.

Mr. Thomas P.E. Herrmann, an attorney from your office representing Ms. Dietz and The Register-Guard, responded by letter dated March 29, 1999. Mr. Herrmann acknowledged Ms. Dietz's receipt of a number of documents from HCSD (at no charge), but submitted that one document was in a form that was "obviously, incomplete and *** was not useful to Ms. Dietz's purpose." Mr. Herrmann insisted that within 10 days HCSD produce the documents requested by Ms. Dietz "completely, in full, promptly and either without charge or with a minimal charge," or provide an explanation of the agency's inability or unwillingness to do so. Mr. Herrmann tendered no payment in response to HCSD's earlier stated requirements.

Mr. Gillespie responded by letter dated April 9, 1999, in which he stated that, subject to remuneration, HCSD was "quite willing to provide any information not subject to exemption from public disclosure" as outlined in the February 23 and March 23 letters. Mr. Gillespie explained that he personally analyzed where the requested information, if available, was likely to be located in the office, and had made every effort to provide "reasonable estimates on the time to assimilate and copy the information." He clarified that the estimated charge was based on the time and expense to produce the information from the 368 Housing Credit files at HCSD's rate of $14 per hour and 10 cents per page copied. Mr. Gillespie continued by noting that as a result of more recent conversations between Ms. Dietz and Mr. Repine, HCSD had agreed to reduce its fee for the non-exempt documents that had not yet been disclosed from $2358 to $1,950. He reiterated that HCSD would promptly refund any unused balance and stated that HCSD was willing to cover any expenses that exceed the $1,950 fee for the agreed upon items.

In a letter dated April 14, 1999, you tendered a check from The Register-Guard for $1,950, remarking that the charges are still "far from reasonable," and notifying Mr. Gillespie that you would pursue a refund after receipt of the documents. You also conditioned your payment as follows: "You are not authorized to cash this check until you deliver to us all of the [listed] documents." Finally, you stated that each "piece of information must be linked."

After further correspondence and telephone calls (including calls with Assistant Attorney General D. Kevin Carlson) related to the conditions on negotiation of the check and the reasons why you considered the reduced fee of $1,950 to be unreasonable, Mr. Gillespie responded to you by letter dated April 29, 1999. In this letter, Mr. Gillespie outlined HCSD's efforts to disclose information to that date, the reduction of fees for further disclosures and HCSD's continued willingness to refund excess fees and to absorb additional costs, if any. He also sought to clarify that because one of the items requested in your April 14 letter (the number of low income housing tax credit units) had not been included in the March 10 request from Ms. Dietz, it was not covered by his letters of March 23 or April 9, and he would need to review files and estimate costs related to this additional item. With respect to your conditioned payment, he added that HCSD was "willing to proceed with the compilation of materials requested while acknowledging the protest and understanding that you might pursue remedies. However, [HCSD] is not willing to accept that the check received is not negotiable until the Register Guard accepts delivery. It is the intent that the remuneration be in advance of cost[s] incurred." He

concluded by saying that he hoped "to receive clarification on the ability of [HCSD] to negotiate the check in a timely manner and [would] do likewise in making a determination on the additional item requested."

You followed Mr. Gillespie's letter of April 29 with your petition to this office on April 30, 1999. While this petition was under consideration, HCSD received a further letter from you dated May 3, 1999, copied to this office, that "clarified" your demand that HCSD not negotiate the $1,950 check until delivery to The Register-Guard and resolution of all items with Ms. Dietz. You indicated that HCSD was free to negotiate the check when it was "prepared to put into the mail the documents requested." You also agreed to accept the number of "units" rather than "low income housing tax credit units" to resolve the difference with Mr. Gillespie's March 23 and April 9 letters.

By letter dated May 10, 1999, Mr. Gillespie agreed on behalf of HCSD to provide the documents covered by HCSD's $1,950 fee subject to the clarified payment condition as detailed therein. His agreement waived any claim for payment of his time, or that of the Director, incurred in corresponding with Ms. Dietz or your office on this matter, as well as for reimbursement of charges to HCSD from this office.

2. Disclosure Order

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.420. Notwithstanding this duty, the Public Records Law does not impose on public bodies the additional duty of creating public records that do not already exist. This office has concluded, for example, that a public body is not obligated to create new information using its computer programs or to create a new program to extract the data in its computer in a manner requested by the public. *See* ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1997) (MANUAL) at 5; Letter of Advice dated June 1, 1987, to Jim Kenney, Supervisor, Urban-Renewal Section, Department of Revenue (OP-6126). Public bodies also have no duty under the Public Records Law to explain or to answer questions about their records. MANUAL at 5

ORS 192.430(2) authorizes public bodies to take reasonable precautions to preserve the integrity of their records and to maintain office efficiency and order. Requestors do not have a right to rummage through files. MANUAL at 10; *see* Public Records Order, May 10, 1996, Kelley. Public bodies also may limit inspections where original documents contain some information that is exempt from disclosure. In such instances, a public body acts reasonably if it furnishes copies of the original records, with exempt materials redacted. *See* ORS 192.505. This office also has found that a public body's decision to furnish copies of records instead of inspection of original documents will be valid if "necessary for the protection of the records and to prevent interference with the regular discharge of [the public body's] duties. MANUAL at 10-11; *see* Public Records Order, July 19, 1982, Baucom.

In the present matter, HCSD has provided or agreed to provide all of the information identified in Exhibit A to your petition (as modified by your May 3 letter to limit item #4 to the

number of units, rather than the number of low income housing tax credit units). In doing so, HCSD has agreed to create certain documents (at least one of which was included in the initial, free delivery of 112 pages) in order to assist in your client's use of the information sought in the requested records. Although you state in your petition that your client's records requests were denied "by failure to respond and produce the records within a reasonable time," we do not find that to be the case. An agency does not constructively deny a records request merely because the agency does not provide access to nonexempt records within a timeframe set by the requestor. MANUAL at 7. In this case, Mr. Gillespie responded to each letter from Ms. Dietz, Mr. Herrmann or you within 10 business days of the letter's receipt. Given the volume of documents originally requested, the necessity for HCSD to assess which of its records contained the requested information, the negotiations regarding reduction of the fees, the failure to tender any payment of the agency's costs until April 14, and subsequent discussion of the conditions upon which the agency could cash that check,[3] we are not prepared to conclude that HCSD unreasonably delayed production of the requested records.

Accordingly, we respectfully deny your petition as to disclosure of the records.

3. Fee Waiver Order

A. Fees Must Be Based on Actual Costs

The Public Records Law authorizes a public body to establish fees "reasonably calculated to reimburse it for its actual costs in making records available." ORS 192.440(2). "Actual costs" may include those costs incurred by a state agency in searching for records that are responsive to the request, in reviewing those records in order to delete exempt material and in excising the exempt portions of records. It also includes other costs incurred in preparing the records for release, such as duplication and special mailing costs. *See* Public Records Order, May 4, 1994, Dixon. "Actual costs" also may include the costs of attorney time in assisting in the release of documents. *See* Public Records Order, May 19, 1993, Smith. Indeed, public bodies may charge for search time and related costs even if they fail to locate any records responsive to the request. *See* 39 Op Atty Gen 61, 68 (1978).

This office has long advised that ORS 192.440(3) authorizes a public body to estimate charges related to a records request and to charge for same on a preliminary basis before acting on the request. MANUAL at 11. Of course, if actual costs turn out to be less than the prepayment, the public body must refund the difference. *Id* at p.12.

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[3] An agency may estimate its costs for responding to a records request and require prepayment of those estimated costs before acting on the request. MANUAL at 11. The purpose for such a prepayment requirement is to ensure that the agency is reimbursed for its costs in responding to a records request. When a check is tendered to an agency on the express condition that it not be negotiated until after the records are delivered, there is no certainty that payment on the check will not be stopped upon delivery of the records and before the check is negotiated. Consequently, we believe that an agency may properly reject such a condition and demand unconditional prepayment before responding to a records request. Nevertheless, we understand that HCSD has agreed to accept the condition that the agency not negotiate The Register-Guard's check until the agency is prepared to put the requested documents in the mail.

You have provided no explanation of why you believe that HCSD's fee of $1,950 is more than the agency's "actual costs" as allowed under the Public Records Law. Mr. Gillespie has confirmed to us, as noted in his letter of April 9, that the information sought is not readily available in a useful form. He informs us that in order to make the requested information available, HCSD must review 274 or more files (each containing between 200 and 800 pages), collate and copy records and develop certain new records. We have no basis to find that the agency will not need to devote a significant number of hours to these activities in order to adequately go through file documents in an efficient and responsible manner or that its estimate of the hours required is excessive. Nor do we have any basis to find that either an hourly rate of $14 or a per page copy cost of 10 cents is more than the agency's actual costs. Moreover, Mr. Gillespie has stated that if the agency does not actually incur the full $1,950 in costs at its quoted rates, it will to refund any surplus.

B. Waiver or Further Reduction of Fees

ORS 192.440(4) allows public bodies to furnish copies "without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction is in the public interest because making the record available primarily benefits the general public." A person who believes that a state agency has unreasonably denied a fee waiver or reduction may petition the Attorney General to review the agency's decision. ORS 192.440(5). You have petitioned the Attorney General under this provision on behalf of The Register-Guard.

As this office has previously expressed to you in a public records order dated May 19, 1993, ORS 192.440(4) does not mandate a fee waiver or reduction. Rather, the statute leaves the decision as to whether or not to reduce fees within the discretion of the agency. *See also* Testimony of Representative Kevin Mannix, House Committee on Judiciary, Subcommittee on Crime, Hearing Tape 67, Side A, 1350 (April 6, 1989).

HCSD has already waived significant fees and reduced others in arriving at its net charge of $1,950. HCSD previously has delivered 112 pages of documents at no charge to your client. These records apparently were those most accessible to HCSD, or those that could be created without an exhaustive review of its files. HCSD also has agreed to waive or to reduce additional charges related to your requests. As noted above, HCSD has waived its costs for the time that the Director and Mr. Gillespie incurred in reviewing files, preparing documents and otherwise responding to the requests. Although the Director's time was not quantified, Mr. Gillespie has devoted approximately 28 hours to the requests. Mr. Gillespie is a section manager whose time is rated at $27 per hour, for a waived fee of $756. HCSD further has waived its costs for approximately 2.4 hours of attorney time related to reviewing the records for disclosure.[4] Attorney time is billed to the agency at $79 per hour, for a waived charge of $189.60. HCSD also has reduced its charge to provide the records, which was based on a staff rate of $14 per hour and 10 cents per copy, from $2,358 to $1,950, for a reduction of $406. HCSD has also agreed, in advance, to waive any additional costs, should they be incurred, for producing the agreed items.

[4] This 2.4 hours of attorney time does not include time related to providing general advice on the Public Records Law or the preparation of this order.

Thus, although HCSD has chosen not to grant a complete waiver of the fee or any further reduction below $1,950, HCSD has waived more than $1,351. This is a waiver of somewhat more than 40 percent of the agency's costs in making the records available.

In determining whether or not a waiver or further reduction of fees would serve the public interest, we consider such factors as: (1) the requestor's identity; (2) the purpose for the request; (3) the character of the information; (4) whether the information already is in the public domain and whether the requestor has the ability to disseminate the information to the public.

We find that there is a public interest in the subject of the request – the efficacy of the Low Income Housing Tax Credit program in promoting suitable housing for low income tenants. The nature of the information and your client's apparent purpose in and ability to disseminate the information all support that conclusion. It was appropriate, therefore, for HCSD to have waived and reduced its standard fees as previously described.

In determining whether HCSD acted reasonably in refusing further waiver or reduction of fees, we consider such factors as those identified in our public records order to you of May 19, 1993, including: (1) any financial hardship on the public body; (2) the extent of time and expense and interference with the business of the public body; (3) the volume of the records requested; (4) the necessity to segregate exempt from non-exempt materials; and (5) the extent to which an inspection of the records is insufficient for the public interest or for the particular needs of the requestor. *See* Public Records Order, May 19, 1993, Smith. *See also* Testimony of Deputy Attorney General Jim Mountain, House Judiciary Subcommittee on Crime, HB 2571, Tape 67, Side A, 1359-1400 (April 6, 1989). Below, we discuss each of these factors.

(1) Extent of time and expense and interference with the business of the agency

Sorting through, narrowing and responding to the records requests previously identified has taken or will take dozens of hours of agency time. Using an estimate of 20 minutes per file based upon Mr. Gillespie's survey of the time needed by him to review each of the subject 274 files, this will take more than 91 hours. That time does not include any of the time needed to prepare additional "linked" documents, to collate, segregate or redact information or otherwise prepare documents for delivery. This represents substantial time and expense for HCSD in responding to the records requests.

According to Mr. Gillespie, the files in question are held in different parts of the agency and are used in its every day business. Giving a high priority to these requests, using significant staff resources and diverting the use of the involved files has resulted, and will continue to result, in significant interference with HCSD's normal activities.

(2) Extent of the sheer volume of the records requested

We are informed that there are at least 274 files relevant to the refashioned records request. A reasonable estimate of the average number of pages in each file is reported to be 400 pages. Some may reach 800 pages. The records involved in responding to the requests are extensive to say the least.

(3) Necessity to segregate exempt from non-exempt materials

Many of the records in each relevant file contain sensitive information exempt from disclosure under the Public Records Law. Businesses, both non-profit and for-profit, give private information to HCSD, much of which is viewed as proprietary, with the settled expectation that any information that is exempt from disclosure will be treated confidentially and will not be disclosed. *See* ORS 192.502(23). This trust in HCSD is important in attracting ongoing customers and in protecting the operation of ongoing projects from undue risk. Because there is this combination of exempt and non-exempt material within the relevant files, efforts will be required to assure appropriate segregation and redaction, as well as to maintain the files in their proper order and condition.

(4) Extent to which an examination is insufficient for the public interest or for the particular needs of the requestor

As noted, Mr. Gillespie explained in his letter of March 23, 1999, to Ms. Dietz, that allowing her to personally inspect and copy documents was not feasible. He observed that records would need to be "aggregated" from the numerous files, that those files contained many exempt documents, that even responsive documents often would require extensive redaction, and that security and proper file maintenance would require staff personnel to stay with and perform the inspection of files. Furthermore, because The Register-Guard wants certain information in composite "linked" form, simple examination of the records by Ms. Dietz would prove insufficient for her own particular needs.

In summary, we note that the Public Records Law does not entitle a requestor to a fee waiver or reduction merely because he or she satisfies the public interest test. The potential hardship on a public body that would arise from granting a fee waiver or further reduction must be considered in determining whether or not a public body's decision to charge a certain fee is reasonable. Here, given the extent of time and expense to HCSD, the volume of the requested records, the necessity of segregating exempt from non-exempt records, and the fact that personal examination of HCSD's records by the requestor would be insufficient for the public interest and the requestor's particular needs, we conclude that HCSD's decision to waive and reduce its fees by more than $1351, rather than granting a complete fee waiver or even more substantial fee

reduction was not "unreasonable." Accordingly, we respectfully deny your petition for complete waiver or more substantial reduction of fees.

Sincerely,

DAVID SCHUMAN
Deputy Attorney General

AGS02199
c: Mr. Bob Gillespie, Manager
HCSD Housing Resource Section