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September 18, 1996

Larry Tuttle, Director
Center for Environmental Equity
Suite 1021
610 SW Alder
Portland, Oregon 97205

Re: Petition for Public Records Disclosure Order
Department of Geology and Mineral Industries Records

Dear Mr. Tuttle:

This letter is the Attorney General's order on your petition for disclosure of records under the Oregon Public Records Law, ORS 192.410 to 192.505. You have petitioned for review of three decisions by the Department of Geology and Mineral Industries (DOGAMI) responding to three separate of requests for public records. Each of these decisions is addressed below.

Exploration Permit Records

In a letter dated August 2, 1996, you requested all DOGAMI records relating to exploration permits issued from July 31, 1990 to July 1, 1996. DOGAMI agreed to provide the records, but refused to move the records from Albany to Portland for your convenience and refused to provide copies until a portion of the estimated fees had been paid. DOGAMI also declined to consider your request for a waiver of fees until you provided information supporting that request.

On August 7, you filed a petition asking the Attorney General to review DOGAMI's decision. In an order dated August 13, the Attorney General concluded: (1) DOGAMI had not refused to provide the records, (2) DOGAMI was not required to move the records from Albany to Portland, (3) DOGAMI had authority to require prepayment of fees, and (4) DOGAMI had authority to require you to provide information supporting your request for a waiver of fees before it made a decision on your request for a fee waiver.

Your petition to the Attorney General included the information upon which you based the request for a fee waiver. We forwarded this information to DOGAMI. DOGAMI responded to your request for a waiver in a letter dated August 20. DOGAMI offered to waive 25 percent of the fees, and also offered a number of options for reducing the overall fees. These options included a suggestion that you inspect the documents and copy only those of interest, rather than having the agency copy all its documents relating to mineral exploration.

In your September 10 petition, you ask the Attorney General to review DOGAMI's refusal to waive all fees.[1/] DOGAMI found that you and your organization meet the "public interest" standard in ORS 192.440(4). The agency went on to conclude, however, that its budget and staffing levels do not allow it to grant a complete waiver. In other words, the agency determined that the size and complexity of your request is extraordinarily large and that a complete waiver of fees would interfere with the agency's ability to fulfill its legislatively mandated mission.

ORS 192.440(4) does not require an agency to grant a complete fee waiver even if the public interest test is met. OREGON ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (1995) at 14. Rather, an agency has discretion whether to waive or reduce fees. DOGAMI has given your request for a fee waiver reasonable consideration. It has considered the volume of records requested and the need to segregate large numbers of records that must be kept confidential pursuant to ORS 517.900. It has calculated the estimated expense and determined that a complete waiver would interfere with the essential business of the agency. Nonetheless, DOGAMI has agreed to a substantial waiver of fees and suggested ways that this total expense can be reduced. Accordingly, we do not find that DOGAMI has abused its discretion by refusing to grant a total fee waiver, and we deny your request for an order requiring DOGAMI to grant a total waiver of fees.

Fee Waiver Records

In a separate letter to DOGAMI also dated August 2, 1996, you asked for a list of all requests for copies of DOGAMI files or materials, the name of the requesting entity, the charges imposed for the copies, whether the charges were waived, and, if so, the justification for the waiver. In a letter dated August 5, 1996, John Beaulieu, Deputy State Geologist, informed you that DOGAMI has no such list. Mr. Beaulieu went on to note, however, his understanding that any waivers granted in the past (except those offered to you and your

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[1/] We do not read your petition to challenge DOGAMI's determination that many of the records within the scope of your request are confidential under ORS 517.900 and that, accordingly, records must be removed or redacted before the records may be inspected or copied.

organization) involved relatively small numbers of documents and insignificant amounts of staff time.

We have confirmed with Mr. Beaulieu his statement to you that DOGAMI has no records within the scope of this request. The Public Records Law does not require agencies to create records. MANUAL at 5. Moreover, there is no requirement that agencies prepare and maintain lists of fee waivers. Accordingly, we deny your request for an order requiring DOGAMI to generate such records.[2/]

Communications Between Staff and the Governing Board

In a letter to DOGAMI dated August 5, 1996, you requested: "All correspondence, notes, write-ups, briefing documents, messages, and records of meetings or telephone calls between DOGAMI and the DOGAMI Governing Board" for the period from January 1, 1994 to August 1, 1996. In a response dated August 7, 1996, Mr. Beaulieu informed you that DOGAMI keeps a separate file with the written communications between DOGAMI staff and the Governing Board (Board Correspondence File). This file is in the Portland Office, and DOGAMI offered to make it available for your inspection with no fee for staff time involved in supervising the review of the file, though a charge would be made for copies if more than a few pages were involved.

Mr. Beaulieu also informed you that given the very general nature of your request, other records within the scope of your request might exist in other files. We have confirmed with Mr. Beaulieu that very few, if any such documents would exist. To locate all these potential records, DOGAMI would need to search all files that were open during the stated two and one-half year period. Mr. Beaulieu noted that this would involve considerable staff time and, consequently, considerable expense for which you would be billed. It does not

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[2/] Your August 19, 1996, letter to DOGAMI also asked whether information on fee waivers exists in a raw form. Mr. Beaulieu advises us that there are no separate files maintained for public record requests and that if there are any records relating to past fee waivers, they would be located in individual files relating to the permit or other matter at hand. In other words, it would be necessary to review all DOGAMI files to locate these records if they exist at all. We do not understand that you have requested DOGAMI to do so, or that the agency has refused.

Additionally, your letter to DOGAMI requested a copy of DOGAMI's written policies relating to charges for public information requests. DOGAMI responded by sending you a copy of its administrative rules governing fees for public record requests. We do not read your appeal to challenge this response. Because these records were supplied to you without charge, the agency in fact waived its fees with respect to this record request.

appear that you have responded to DOGAMI's letter, other than to repeat your original request in your subsequent letter of August 19, 1996, to Don Hull, State Geologist.

We conclude that DOGAMI has not denied you access to the requested documents. The agency has offered to allow you to inspect the Board Correspondence File, and it has put you on notice of the extraordinary cost of searching all of the agency's files to determine if there are other records that fall might within the scope of your general request. We have confirmed with Mr. Beaulieu that DOGAMI has been waiting for a response from you with respect to whether you wished to clarify the scope of your request. We understand, however, from your August 19 letter and your September 10 petition that you do wish to proceed to search all of DOGAMI's records for the stated period. Accordingly, we have consulted with Mr. Beaulieu, who informs us that the agency has agreed that within seven days of the date of this letter, it will estimate the fees for responding to this request and it will inform you whether any of these fees will be waived. Because DOGAMI has neither denied your request for the records nor yet made a decision with respect to a waiver of its costs of making such records available, we deny your petition as to these records as premature.

Sincerely,

Elizabeth S. Harchenko

ELIZABETH S. HARCHENKO
Special Counsel to the
Attorney General

LK:AV:kt/JGG0E824
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John Beaulieu, DOGAMI

bc: Gary Lynch, Supervisor
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