

April 7, 2000

Brett Brownscombe
Northwest Environmental Defense Center
10015 S.W. Terwilliger Blvd.
Portland, Oregon 97219

Re: Petition for Review of Denial of Fee Waiver
Oregon Department of Agriculture Records

Dear Mr. Brownscombe:

This letter is the Attorney General's order on your petition for review of the Oregon Department of Agriculture's (Department) denial of your request to waive the fee for a public records request under the Oregon Public Records Law, ORS 192.410 to 192.505. Your petition asks the Attorney General to review the Department's policy with regard to fee waiver requests and to review the reduction by the Department of the public records fee by 25 percent in lieu of the full waiver requested by your organization. For the reasons below, we respectfully deny your petition.

1. Background

The Northwest Environmental Defense Center (NEDC) requested from the Department its database for confined animal feeding operations (CAFO) and its records regarding non-compliance by CAFOs with applicable regulations as of the date of the request. NEDC stated that the information requested would be used to educate the public, its members and board with regard to CAFO operations. In response to NEDC's request to waive the fee for this public records request, the Department, by letter dated February 10, 2000, reduced the fee by 25 percent.

NEDC seeks review of the denial of its fee waiver request, noting that the Department has waived its fee for public records requested by NEDC on two recent prior occasions. Additionally, NEDC seeks review of the Department's alleged policy of categorically reducing public records fees by 25 percent for non-profits representing the public interest, contending that fee reduction or waiver decisions should be made on a case-by-case basis.

2. Department's Policy

Pursuant to ORS 192.440(5), the Attorney General has authority to review a public body's decision as to a fee waiver or reduction of a public records request. ORS 192.440(5) provides that "a person who believes that there has been an unreasonable denial of a fee waiver or fee reduction may petition the Attorney General * * * in the same manner" as for the denial of a record. Absent a denial of a request for records under the Public Records Law or a denial or a request for a fee waiver or fee reduction, the Attorney General has no jurisdiction over a public

records petition. Public Records Order, March 29, 2000, Mayes. On a petition claiming that an agency unreasonably denied a fee waiver or reduction, the Attorney General's review is limited to consideration of the agency's decision as to the particular records request. The authority granted to the Attorney General in ORS 192.440(5) does not extend to review of an agency's general policy with regard to fee waivers or reductions. Because this office does not have jurisdiction to review an agency's policy with regard to public records fees, we deny that part of your petition seeking review of the Department's alleged policy of granting a 25 percent fee reduction to non-profits serving the public interest.¹

3. Fee Waiver and Reduction

The Public Records Law confers a right to access to any public record of a public body in Oregon, subject to certain exemptions and limitations and subject to fees imposed by the public body for the cost of providing the record. ORS 192.420. Any fee imposed by a public body must be "reasonably calculated to reimburse it for its actual cost in making such records available including costs for summarizing, compiling or tailoring such record, either in organization or media, to meet the person's request." ORS 192.440(3). An agency that has established fees for public records requests 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 192.440(4). ORS 192.440(4) does not require a fee waiver, but places the discretion to make this decision with the agency. In reviewing an agency's exercise of that discretion, we consider: a) whether a waiver is prohibited by law, b) whether the "public interest" test is met, and c) whether the agency's decision was "unreasonable." ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETING MANUAL (1999) (MANUAL) at 13; Public Records Order, November 10, 1994, Pittman; Public Records Order May 19, 1993, Smith.

a. Waiver Prohibition

Although ORS 192.440(4) allows a public body to waive its fees for furnishing public records when it determines that it is in the public's interest to do so, some public bodies cannot waive fees for making records available even if the provisions of ORS 192.404(4) are met. If a public body's sole funding for a particular program is from funds that are constitutionally, statutorily or otherwise legally dedicated, the public body in responding to a public records request, may not charge fees that are lower than its actual costs. MANUAL at 14. The Department receives funding from the general fund as well as from legally dedicated funds. Because the Department is not solely funded by statutorily or otherwise legally dedicated funds, we do not believe that it is prohibited from waiving or reducing fees for a public records request.

b. "Public-Interest" Test

¹ Although this office does not have authority to review an agency's policy with respect to public records fee waivers or reductions, we note that Debbie Gorham, Administrator of the Department's Natural Resources Division, informs us that the Department reviews each fee waiver or fee reduction request on a case-by-case basis.

The next question is whether it is in the public interest to make the information available. A state agency may waive or reduce fees for a public records request if making the records available primarily benefits the general public. Factors to consider under the public interest test include the requestor's identify, the purpose for which the information will be used, the nature of the information, whether the information already is in the public domain, and whether the requestor can demonstrate the ability to disseminate the information to the public. The requestor's ability to pay also is a factor but alone is not sufficient to deny a fee waiver. MANUAL at 14-15.

Here, the agency has acknowledged that NEDC satisfies the public interest test for purposes of this request. Because the agency already has made a public interest determination, we need not review the agency's decision in this regard.

c. Reasonableness of Decision to Deny Fee Waiver

Even when the public interest test is met, the decision to waive or to reduce fees is discretionary with the public body, although it must act reasonably. *See* Public Records Order, August 1, 1991, Larson (noting that Oregon fee waiver provision was modeled after the federal Freedom of Information Act, and citing *Lybarger v. Cardwell*, 438 FSupp 1075, *aff'd* 517 F2d 764 (1st Cir 1978), for proposition that agencies have considerable discretion to determine whether to charge a reduced fee and complete discretion as to amount of reduction).

In the past 12 months, NEDC has made approximately 12 public records request to the Department. In the aggregate, the public records requests made by NEDC have required a significant amount of staff time and expense. For each request, one or more Department employees must review it, determine whether the information requested is available, assemble the information, review the assembled information for exempt records and prepare a response. These duties are in addition to the employee(s) regular duties.

For this CAFO related request, the Department did not waive its fee as requested, but instead reduced its fee by 25 percent to \$54.22. _____ informs us that when deciding whether to waive fees for a public records request, the Department considers the public interest in making the information available as well as the public's interest in the agency and how it conducts its business and expends public monies. _____ further informs us that, in light of its public duties and responsibilities, the Department has concluded that it cannot repeatedly direct its attention to public records request at the expense of its other duties and provide the requested records free of charge.

We do not believe that this approach is arbitrary or capricious or that the Department's decision not to waive the entire fee for the records request that is the subject of this petition was unreasonable, particularly since the Department has waived its fee with regard to at least two earlier NEDC requests. Nor do we find that the agency's reduction of its fee by 25 percent was unreasonable. Although the total fee is relatively small, a 25 percent reduction is a substantial reduction. Because we do not find that the Department acted unreasonably, we deny your petition.

Brett Brownscombe

August 4, 2000

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