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February 15, 2012

Paul Frasier
Coos County District Attorney
Coos County District Attorney's Office
250 N. Baxter
Coquille, OR 97423

VIA CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Re: Appeal of Sierra Club Public Record Request to the Port of Coos Bay

Dear District Attorney Frasier:

This is an appeal under the Oregon Public Records Act (“OPRA”), ORS 192.410, *et seq.* By this letter, the Sierra Club (“Club”) seeks reversal of the Port of Coos Bay’s (“Port”) decision to deny access to requested public information through the unfounded assertion of various disclosure exemptions and the assessment of a fee of almost \$20,000 for the production of an estimated 2,500 pages of documents responsive to the Club’s OPRA request. The Club further seeks reversal of the Port’s rejection of the Club’s request for public interest waiver of that fee.

As addressed in detail below, the Port has not sustained its burden to establish that any disclosure exemptions apply to the requested information. Further, the fee assessment does not appear to be reasonably calculated to reimburse the Port for its actual response costs. To the contrary, it appears that the Port’s fee assessment is excessive and may be intended to prevent the public’s access to information that is not exempt under the OPRA. Additionally, the Port has denied the Club’s request for a public interest fee waiver, apparently based on factors irrelevant to the fee waiver analysis that are unduly invasive and burdensome, and that appear to be designed to stifle the public’s access to the requested information.

The OPRA specifically establishes that you — as the District Attorney for the county in which the Port is located — are the officer responsible for deciding this appeal. *See* ORS 192.450, 192.460(1)(a).

BACKGROUND

On June 30, 2011, the Club submitted to the Port a request for information under the OPRA, attached hereto as **Exhibit A**. The request sought information to provide public oversight to help “ensur[e] that coal mines and ports comply fully with all applicable statutes and regulations.” *Id.* at 1. The Club also indicated that “our organization intends to use the requested information to benefit the public so the public can better understand the government’s activities related to using coastal property to export coal.” *Id.* at 2. The request sought a waiver of any fees associated with the request on the grounds that release of the information would serve the public

interest. *Id.* at 2-3. In closing, the Club’s counsel asked the Port “to facilitate delivery, please email electronic copies of the requested documents.” *Id.* at 3.

Subsequently, by letter dated July 8, 2011, the Port, through its counsel Mike Stebbins, responded by informing the Club that the Port estimated that a search would generate approximately 1,500 pages of records responsive to the OPRA request which would be released to the Club upon payment of a fee the Port estimated to be \$10,565.00. *See Exhibit B*, attached hereto, at 2. The Port asserted that a factor contributing to the fee assessment was the possible application of a number of disclosure exemptions to the requested information. *Id.* at 2. In its letter, the Port also propounded a series of interrogatories that it suggested were necessary to determine if the Club’s request satisfied the OPRA’s “‘public interest’ [fee waiver] test.” *Id.* at 3.

In response to the Port’s interrogatories, by letter dated August 16, 2011, the Club challenged the Port’s fee assessment as excessive. *See Exhibit C*, attached hereto, at 3-5. The Club further asserted that the disclosure exemptions claimed by the Port appeared to be inapplicable to the requested information because they are conditioned on the public interest favoring withholding, not release. *Id.* at 1. Finally, the Club’s letter provided a detailed description of the legal context for the fee waiver analysis and specific factual support for its request. *See id.* at 5-11 and associated exhibits. Although the Club provided substantially more information than necessary to establish that the OPRA’s public interest fee waiver applied to the requested information, it refused to respond to a some of the Port’s interrogatories that were “not tied to factors relevant to the fee waiver analysis and are unduly invasive and burdensome and similarly appear designed to stifle the public’s access to the requested information rather than a good-faith effort to evaluate the merits of the fee waiver request.” *Id.*

On September 1, 2011, the Port replied to the Club’s August 16th letter by reiterating its \$10,565.00 fee assessment and its contention that the Club had not satisfied the OPRA’s public interest fee waiver standard. *See Exhibit D*, attached hereto, at 1-5. The Port also inquired if the Club intended to supply any further information in support of its request, if it intended to rely on the record developed to that point, or if it wished to withdraw its request. *See id.* at 6.

The Club’s response, dated September 30, 2011, informed the Port that it would rely on the record developed to that point to support its fee waiver request and would not be providing any additional documentation.¹ *See Exhibit E*, attached hereto, at 1-2. The Club’s letter concluded:

We are open to further discussions about ways to limit our request, reduce the amount of time spent responding to it, produce documents electronically to reduce copying expenses, narrow an initial production to a smaller universe of documents and other such solutions. Our aim is to obtain the requested public information in the most efficient and expedient manner possible.

Id. at 3.

¹ The Club did, however, furnish a hyperlink (<http://www.sierraclub.org/bod/meet-the-board/default.aspx>) leading to profiles of the Club’s Board of Directors because it was already freely available as public information. *Exhibit E* at 2. *See* detailed discussion of issue at p. 10-11.

The parties then exchanged letters resulting in a narrowing of the scope of information sought by the Club. See **Exhibit F** (Port letter dated October 19, 2011) and **Exhibit G** (Club letter dated October 24, 2011), attached hereto. The Port responded by a letter of inquiry dated October 27, 2011, **Exhibit H**, attached hereto, seeking clarification of the Club's October 24, 2011, narrowing letter. The parties subsequently conferred in a conference call on November 1, 2011, to address the Port's questions. The Club then produced a letter of the same date, **Exhibit I**, attached hereto, narrowing its request:

1. All records relating to proposals to export or store coal at the Oregon International Port of Coos Bay, Oregon 97420, hereafter referred to as ("Port"), pertaining to the four proposals code-named Versatile, Mainstay, Clover and Glory (to the extent that the proposals include coal handling activities), including, but not limited to:
 - A. Any and all emails, minutes, and/or notes from meetings between the Board of Commissioners and prospective or current owners and/or lessees, which address potential or pending proposals to export or store coal at the Port; and
 - B. Any and all emails, minutes, and/or notes from meetings between the Board of Commissioners and the Dutch consulting firm Portolan, which address potential or pending proposals to export or store coal at the Port; and
 - C. Any and all communications (including, but not limited to, letters, emails, and applications) between the Boards' staff, commissioners, agencies, and/or others which discuss potential or pending proposals to export or store coal at the Port; and
 - D. Any and all applications for coal export terminals or multi-commodity terminals that include coal export, or proposals to store coal at the Port.
2. All records relating to any proposals for coal export facilities at the Port pertaining to the four proposals code-named Versatile, Mainstay, Clover and Glory, including, but not limited to, applications for permits, discussions of permits or permits issued; agendas and minutes of meetings with representatives from interested companies or where the proposals pertaining to an outside company were discussed.
3. All records relating to the location of the land leased and/or owned by outside companies for coal handling purposes pertaining to the four proposals code-named Versatile, Mainstay, Clover and Glory (to the extent that the proposals include coal handling activities), including maps and the physical address.

Id. at 1-2 (footnote omitted). This list constitutes the scope of the information request at issue in this matter. During the parties’ conference call on November 1, 2011, the Port stated its intent to issue a final decision on the Club’s request within one week, by November 8, 2011. *See, e.g., id.* at 1.

The process below was concluded by the Port’s letter dated November 15, 2011, **Exhibit J**, attached hereto, in which it responded to the Club’s narrowing of its request by almost doubling the initial fee assessment to \$19,981.00. *Id.* The Port assessed a 75¢ per page fee for duplication costs associated with a new estimate of 2,500 pages of responsive documents. *Id.* The Port did not explain why it added 1,000 pages to its estimate of responsive documents after the Club had narrowed the scope of its initial request. *Id.* However, the vast majority of the fee assessment is \$16,666.00 for attorney review time of responsive records — 83.3 hours at \$200/hr. *See id.* This amount, by itself, exceeds the original *total* fee estimate by over \$6,000.00 and an increase of over 100% in time allocated for attorney review. *Compare id.*, to Exhibit B at 2. The Port did not explain how its estimated 40% increase in the number of responsive documents justified more than doubling of the estimated attorney review cost. And finally, the Port denied the Club’s public interest fee waiver request. *Id.* This appeal is taken from the record below.

DISCUSSION

1. The Legal Context of this Request and Appeal.

This information request should be viewed in the context of Oregon’s longstanding policy in favor of access to public records. The general statement of legislative policy regarding public records has remained virtually unchanged for almost 150 years and provides that “[e]very person has a right to inspect any public record . . . except as otherwise expressly provided by ORS 192.501 to 192.505.” ORS 192.420.²

The Oregon Public Records Act establishes a statutory scheme in which full disclosure is the rule and there is a “strong public policy favoring public access to government records.” *Papadopoulos v. State Board of Higher Education*, 8 Or. App. 445, 454, (1972); *Jordan v. Motor Vehicles Division*, 308 Or. 433, 438 (1989)(*en banc*). “Disclosure is the norm; exclusion is the exception that must be justified by the public body.” *Guard Publishing Co. v. Lane County School Dist.*, 310 Or. 32, 39 (1990); *City of Portland v. Rice*, 308 Or. 118, 121 (1989) (“Disclosure for inspection on request is the general rule to which expressly provided exemptions are the exceptions.”). “[A] public agency always has the burden of sustaining applicability of an exemption to avoid disclosure . . . when its decision to exempt is questioned.” *Jordan*, 308 Or. at 443, n. 9 (internal citations omitted). “To satisfy that burden, a public body must establish exemptions from disclosure ‘on an individualized basis.’” *Mail Tribune, Inc. v. Winters*, 236 Or. App., 91, 95 (2010). Exemptions from disclosure are to be narrowly construed and courts will “presume” that the exemptions do not apply. *See Guard Publishing Co.*, 310 Or. at 37; *Jordan*, 308 Or. at 438-39; *Coos County v. Or. Dept. of Fish and Wildlife*, 86 Or. App. 168, 173 (1987). The legislative history of the Act indicates that the legislature intended that the OPRA be applied simply, quickly and with a large measure of uniformity. *See Guard Publishing Co.*, 310 Or. at 37; *Pace*

² An 1862 law originally granted a statutory right to “inspect any public writing of this state, except as otherwise expressly provided by this code or some other statute.” General Laws of Oregon, ch. 8, § 707, p. 326 (Deady 1845-1864).

Consultants v. Roberts, 297 Or. 590, 594 (1984); *Ayers v. Lee Enterprises Inc.*, 277 Or. 527, 531-34 (1977).

The Port is a “public body” as defined by statute and is hence subject to the terms of the Act and the requested materials are clearly “public records” as that term is defined by the Act. See ORS 192.410(3)-(4). Additionally, a public record “includes any writing containing information relating to the conduct of the public's business . . . prepared, owned, used or retained by a public body regardless of physical form or characteristics.” ORS 192.410(4)(a).³

When providing a public record, the OPRA also allows a public body to establish a reasonable fee. However, the burden of fee justification rests upon a public body no less squarely than it does when an exemption to record disclosure is at issue. The OPRA permits public entities to “‘establish fees *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.’ Accordingly, the statute places the burden on the public body to show that the fees are reasonably related to its actual costs.” *Davis v. Walker*, 108 Or.App. 128, 131-132 (1991) (emphasis in original); see also 39 Op. Att’y Gen. 721, 725-26 (Or.1979)(“The practice of charging a fee in excess of the actual cost incurred in making public records available for inspection or copying would detrimentally restrict public access to such records.”); ORS 192.440(4)(a).

A public body may reduce or waive fees if the body determines that such a reduction is in the “public interest because making the record available primarily benefits the general public.” ORS 192.440(5). This determination properly addresses questions pertaining to: “the requester’s identity, the purpose for which the requester intends to use the information, the character of the information, whether the requested information is already in the public domain, and whether the requester can demonstrate the ability to disseminate the information to the public.” Attorney General’s Public Records and Meetings Manual (“Manual”) at 20 (2011). The Oregon Attorney General notes that the public interest fee waiver must be analyzed in terms of the benefit to the community of obtaining the requested information:

A matter or action is commonly understood to be ‘in the public interest’ when it affects the community or society as a whole, in contrast to a concern or interest of a private individual or entity.” In addition, [the Court of Appeals has] stated that “a matter or action ‘primarily benefits the public,’ * * * when its most important or significant utility or advantage accrues to the public.” Therefore, the public interest test is satisfied “when the furnishing of the record has utility – indeed, its greatest utility – to the community or society as a whole.

Manual at 18 (2011) (citing *In Defense of Animals v. OHSU*, 199 Or App. 160,187-89 (2005)).

³ Additionally, “If the public record is maintained in a machine readable or electronic form, the custodian shall provide a copy of the public record in the form requested, if available.” ORS 192.440(3).

Similarly, judicial interpretation of the federal Freedom of Information Act’s (“FOIA”) fee waiver provision, 5 U.S.C. § 552(a)(4)–(A),⁴ holds that a *prima facie* basis for granting a fee waiver exists when a requester has “identified why they wanted the [information], what they intended to do with it, [and] to whom they planned on distributing it.” *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d. 53, 55 (9th Cir. 1997). When a requester provides this information, the burden then shifts to the public body to disprove the fee waiver request. *Id.*

It is clear from the record of this case that the Port has not: (1) carried its burden regarding its assertion that disclosure exemptions apply to the requested information; (2) carried its burden regarding its fee assessment, or; (3) carried its burden to sustain its denial of the Club’s fee waiver request. Against this background, the Club will now specifically address these matters below.

2. The Port Has Not Established that the OPRA’s Disclosure Exemptions Apply to the Records at Issue in this Matter.

As discussed above, a public body may not simply make blanket assertions of exemptions, it is instead required to make “an individualized showing of justification for an exemption” in each instance that it wishes to withhold information from the public. *Guard Publishing*, 310 Or. at 40. The Port has not sustained its burden in this regard.

The Port has vaguely asserted that four different disclosure exemptions “may apply” to the information by the Club.⁵ The Club’s task to squarely address the disclosure exemption issue is somewhat problematic because the Port has failed to properly present its claims in the proceedings below. The record reveals that the Port has broached the issue of disclosure exemptions only three times—in its initial response letter dated July 8, 2011, in its letter dated September 1, 2011, in its final decision letter of November 15, 2011. *See* Exhibit B at 2, Exhibit D at 2-3, and, Exhibit J. In the first letter, the Port’s counsel expressed a “concern” that four particular exemptions could apply: “I *would expect* that these exemptions will be pursuant to ORS 192.501(2), 192.502(1), 192.502(4), 192.502(9) or other exemptions.” Exhibit B at 2 (emphasis added). There was no direct claim that any exemptions actually *did* apply, merely a “concern” and an “expectation” that some exemptions might be invoked if the Port ever got around to considering the issue more closely. Nor was there any effort to explain — or even to describe — the types of documents that might be included within the scope of these exemptions or how they might apply. Certainly the Port did not give an “individualized showing of justification for an exemption.”

In its letter of August 16, 2011, the Club responded by observing:

Your letter also suggests that four of the OPRA’s disclosure exemptions, ORS 192.501(2), .502(1), .502(4) and .502(9), may apply to information responsive to this request. Because the Port has not yet formally invoked any of these exemp-

⁴ Because Oregon’s fee waiver provision is based on the federal FOIA, it is appropriate to look to federal courts for guidance when interpreting the OPRA. Manual at 18; *see also Marks v. McKenzie High School Fact-Finding Team*, 319 Or. 451, 458 (1994) (considering federal courts’ interpretations of the FOIA because that statute was “reviewed by the Oregon legislature before it enacted the Public Records Law.”).

⁵ As discussed below, at various times, the Port has specifically cited to five different disclosure exemptions, but it appears to have abandoned one, ORS 192.502(9), and the Club will therefore not address it in this appeal.

tions, the issue of whether they do apply is not ripe for discussion. However, I note that the first three exemptions you list are expressly conditional and do not apply if release of the information will benefit the public interest. Accordingly, based on the public benefit associated with the release of the information as discussed in this letter, we believe it unlikely that these disclosure exemptions would apply in this matter. Eliminating the need to identify and redact information that might otherwise fall within these exemptions would obviously significantly reduce the time and cost associated with the Port's response to this request. Accordingly, to the extent that the Port improperly invokes the conditional exemptions in this matter — notwithstanding the clear public benefit attendant to the release of the requested information — it would unlawfully inflate the fee assessment beyond an amount reasonably calculated to reimburse it for its actual cost.

Exhibit B at 1, n 1.

The Port's second letter, dated September 1, 2011, provided a slightly more specific treatment of the exemption issue, at least to the extent that it actually listed the exemptions that the Port claimed "may" apply in that letter, in this instance ORS 192.502(4) ("confidential submissions") and ORS 192.501(2) ("trade secrets"). *See* Exhibit D at 2-3. However, regarding these two particular exemptions, the Port simply ignored the Club's contention, raised in its August 16th letter, that the "exemptions you list are expressly conditional and do not apply if release of the information will benefit the public interest. Accordingly, based on the public benefit associated with the release of the information as discussed in this letter, we believe it unlikely that these disclosure exemptions would apply in this matter." Exhibit B at 1, n 1. The Port simply listed the elements of the two exemptions, and did not tie the elements to the information sought in the Club's requests or explain why the public interest would not benefit from its release.

Additionally, the Port alleged — again without any substantive discussion — that two other exemptions could apply. "Similarly, some of the same information *may* be evaluated under the terms of ORS 192.502(17), to the extent that the exemption is generally applicable and the records marketing strategy information that has to do with the informant's plans to address specific markets and the informant's strategy regarding specific competitors." Exhibit D at 3 (emphasis added). The Port's suggestion that the so-called "Economic Development Information" exemptions "may" apply is again lacking in any direct claim that the exemption actually *does* apply, just as it fails to describe the types of documents that might be included within the scope of the exemption.

The Port claimed that another conditional exemption for "internal advisory communications," ORS 192.502(1), could apply to some of the requested information.⁶ *Id.* However, the Port's explanation appears to gloss over the fact that the statute establishes a presumption that "[t]his exemption shall *not apply unless* the public body shows that *in the particular instance* the

⁶ As noted above, in its first letter, the Port also suggested in passing that ORS 192.502(9) (incorporating other Oregon statutes establishing specific exemptions) might be invoked. Exhibit B at 2. However, the Port has not asserted this claim further — nor did it explain it when first cited — and the Club understands that it has been abandoned and will not address it herein.

public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.” ORS 192.502(1) (emphasis added). The Oregon Attorney General has noted that “due to its many conditions, this exemption applies narrowly.” Manual at 58.

Finally, in its decision letter, the Port reiterates, without substantive explanation, that it invokes ORS 192.502(4) pertaining to confidential information. *See* Exhibit J.

In each of these instances, although the Port cited to a specific disclosure exemption under the OPRA, it has completely failed to provide the “individualized showing of justification for an exemption” that is required under the Act. *Guard Publishing*, 310 Or. at 40; *see also Mail Tribune*, 236 Or. App. at 95 (To “satisfy [its] burden, a public body must establish exemptions from disclosure ‘on an individualized basis.’”). Accordingly, the Port has not sustained its heavy “burden of sustaining applicability of an exemption to avoid disclosure . . . when its decision to exempt is questioned.” *Jordan*, 308 Or. at 443, n. 9. Additionally, the Port’s refusal to adequately explain the basis for asserting the exemptions prevents the Club from specifically refuting the Port’s position.

As the record reveals, the Port has failed to refute the Club’s position that the three conditional exemptions that it asserts — ORS 192.501(2), .502(1), and .502(4) —are in applicable because the public interest supports releasing the requested information. The Club’s public benefit argument is premised on the same set of facts and analysis that support its fee waiver request. The Port’s silence in this regard renders its decision unlawful.

Moreover, because the Port has suggested that the disclosure exemptions could require legal review that constitutes the vast majority of its assessed fee (almost \$17,000 of the estimated \$20,000 total), it is clear that if the exemptions do not apply, the cost of responding to the request would be dramatically reduced. As the Port has demonstrably failed to sustain its allegations that the OPRA’s disclosure exemptions apply, it is in no position to justify its fee assessment in this matter. The Club now turns to the fee assessment issue.

3. The Port’s Fee Assessment is Excessive and Not Reasonably Calculated to Reimburse it for the Actual Cost of Responding to the Club’s Request.

The Port of Coos Bay has not met its burden of showing that the fees it has assessed are related to its production of documents in the electronic manner requested by the Club, and, moreover, the Port’s nearly \$20,000 fee is a constructive denial of the public information request. The OPRA places the burden on a public body to show that assessed fees are reasonably related to the actual costs of responding to an information request. *Davis v. Walker*, 108 Or.App. at 131-132 (“Under [former] ORS 192.440(3), a public body ‘may establish fees *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.’”) (emphasis in original); *see also* 39 Op. Att’y Gen. 721, 725-26 (Or.1979) (“The practice of charging a fee in excess of the actual cost incurred in making public records available for inspection or copying would detrimentally restrict public access to such records.”). In this case, the magnitude of the Port’s fee constructively denies the Club, and the public, its right to public information.

As noted in the preceding section, because the Port has not carried its burden to establish that any of the OPRA's disclosure exemptions apply to the requested information, there is no lawful basis to assess the almost \$17,000 fee for legal review and redaction that it claims. *See* Exhibit J. Consequently, because that amount is not an "actual cost" within the meaning of ORS 192.440(4)(a), the Port's fee assessment is unlawful under the OPRA.

Additionally, the Port's stated rationale for the nearly \$20,000 fee calculation is itself suspect. For example, in its initial letter, the Port asserted that searching for records responsive to the Club's request would cause disruption to the workday and therefore calculated lost work time for each Port official:

a significant disruption of day-to-day operations at the Port because a search will need to be conducted on the computer of each member of Senior Management. *They will not have access to the computer at that time, and the search is expected to take up to 7 hours per individual.*

July 8, 2011 letter at 2, Exhibit B (emphasis added).

However, assuming that the various computers that might be searched for this request are part of a network, the Port's assertion that "each member of Senior Management . . . will not have access to the[ir] computer" during a search for records is implausible. It is a simple matter for IT staff to remotely review the files of a networked computer without denying access to that computer to its primary user. The Port's letter is silent as to why this approach cannot be employed here. These points were made in the Club's August 16, 2011, letter. *See* Exhibit C at 4. However, although the Port subsequently corresponded with the Club on a number of occasions, it never responded to the Club's point regarding this issue.

Similarly, as with the prior questions regarding the Port's time estimates, the Port's suggestion that it would require an entire work-day (7 hours), for IT staff to electrically search the files on a single computer, presumably with the guidance of that computer's user, strains credibility and suggests that it and other aspects of the Port's fee estimate are inflated.

Moreover, the Port's final decision letter asserts that it will require 83.3 hours of professional legal time (at \$200 per hour) to review, redact, and segregate responsive records. *See* Exhibit J. For the sake of argument, even if the disclosure exemptions alleged by the Port do apply to some of the requested information—a contention the Club vigorously rejects—it is difficult to understand how it could take the entirety of two work-weeks of legal time to provide a legal review of merely 2,500 pages. At first blush, it may appear that the Port's estimate of "two minutes of attorney time per page," is a reasonable one. *See id.* However, that assumes that each and every page will require focused attorney attention. That is not a plausible contention. In all likelihood, given the context of this request, many responsive documents will clearly not contain any plausibly exempt information and can thus be "cleared" for release in short order without a page-by-page review. Indeed, the Port does not explain why it would not be possible to employ clerical or paralegal staff billing well below \$200 per hour to undertake an initial review of the documents and tag only those requiring the professional attention of an attorney for final review.

As appellant's lawyer in the *In Defense of Animals* case, the undersigned counsel can attest that at oral argument, Judge Brewer expressed deep reservations regarding the practice of

agencies “gold-plating” fee estimates by inflating projected time involved or involving staff with pay rates far above the basic clerical tasks required to be performed, a tactic that is squarely rejected in the opinion. *In Defense of Animals*, 199 Or App. at 185 (“Specifically, where the information that OHSU asserts, and that we have determined, is exempt from disclosure consists only of the *names* of companies, experimental medications, and staff, we do not understand why it is necessary for OHSU to use professional staff, such as veterinarians, to redact that information.”) (emphasis in original). Based on the Port’s description of its fee assessment process, it appears that it is engaged in precisely the “gold-plating” directly rejected by the Oregon Court of Appeals in this case. The example presented in *In Defense of Animals* was an extreme case of gold-plating but a similar fault also exists here and a more economical process is available. Paying an experienced attorney \$200 per hour to spend *two weeks full time* looking at only 2,500 pages of information is outrageous. In complex litigation it is typical, even necessary, to use paralegals or clerical staff rather than highly compensated attorneys to undertake review of the type implicated here when processing vast numbers of technical documents in a discovery context. The Port has not explained why that option cannot be utilized in this matter.

Similarly, the Port has not explained why it added 1,000 pages (from 1,500 to 2,500) to its estimate of responsive documents after the Club had *narrowed* the scope of its initial request. *See* Exhibit I at 1-2. To put a finer point on it, the Port has not explained how its estimated 40% increase in the number of responsive documents justified more than *doubling* the estimated attorney review cost from \$8,200, Exhibit D at 2, to \$16,666, Exhibit J.

Regarding the Port’s assessment of a 75¢ per page cost, found in Exhibit J, the Club had explicitly requested that the information be released in electronic format to expedite processing and reduce duplication costs. Exhibit A at 3 (“please email electronic copies of the requested documents to this email address.”). As noted above, the OPRA mandates that public records maintained in electronic form shall be provided if available. *See* ORS 192.440(3). It is clear from the Port’s correspondence that the majority of the information responsive to this request is maintained on computers. Based on the Port’s estimate of 2,500 pages of responsive records, at 75¢ per page it is assessing \$1,875.00 for photocopying alone. The Club’s request for electronic copies of the information renders the Port’s effort to charge for paper copies both superfluous and punitive. The Port has not responded to the Club’s request for electronic documents nor has it attempted to explain why such a mode of delivery would not be “available” as required by ORS 192.440(3).

For these reasons, the Club believes that the Port has not met its burden to establish the basis for its fee assessment, and that its estimate unlawfully inflates the costs that should reasonably be incurred in this matter.

4. The Port Unlawfully Denied the Club’s Fee Waiver Request.

The Club has properly provided the *prima facie* information for granting a fee waiver, and the Port has not properly disproved its waiver request. The OPRA provides that “[t]he custodian of any public record 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(5). Factors properly considered by a public body are “the requester’s identity, the purpose for which the requester intends to use the information, the character of the information, whether the requested

information is already in the public domain, and whether the requester can demonstrate the ability to disseminate the information to the public.” Manual at 20. Additionally, a “requester’s inability to pay” may be considered, “but is not, on its own, a sufficient basis for [granting] a fee waiver.”⁷ *Id.* A *prima facie* basis for granting a fee waiver exists when a requester has “identified why they wanted the [information], what they intended to do with it, [and] to whom they planned on distributing it.” *Friends of the Coast Fork*, 110 F 3d. at 55. When provided with this information, the burden rests upon the public body to disprove the waiver request. *Id.*

Rather than focus on factors germane to a proper review of the Club’s fee waiver request, the Port’s letter of July 8, 2011, inquired into a broad range of legally irrelevant, invasive and unduly burdensome matters. Although it did seek some pertinent information, the Port requested:

- Information regarding SC’s Corporate existence including, at a minimum:
 - a. Evidence of SC’s status as a 501c(3) organization.
 - b. Copies of SC’s Articles of Incorporation, Bylaws, and other governing documents.
 - c. A list of SC’s Board of Directors, including the place of employment and/or other primary source (more than 25%) of annual income for each Director.
- A copy of all fundraising materials, including letters, flyers, grant applications, and other communications that reference, in any manner the export, storage, or use of coal.
- An itemized list of all contributions, grants, or other financial income received by SC in response to fundraising materials that reference the export, storage, or use of coal, to include the source of income, amount of income, date(s) received, and manner in which the income was spent.
- A copy of all communications made by SC to any person, agency, or organization regarding the export, storage, or use of coal at the Port that expressed an opinion regarding the export, storage, or use of coal at the Port or advocated that the person, agency, organization take or refrain from taking any action with respect to the Port handling coal.
- A list of members of SC who live within the boundaries of the Port District and recreate at or near the Coos Bay Estuary.
- A copy of SC’s IRS form 990 for tax years 2007, 2008, 2009, and 2010 (if available), and any other evidence of SC’s inability to pay the fees incurred in re-

⁷ From the information provided by the Club in the proceedings below, it is clear that it is not seeking a fee waiver based solely upon an inability to pay the Port’s fee assessment. As noted in the attached declaration of Laura Stevens, payment of the tens of thousands of dollars the Port proposes to charge for this request would impose a prohibitive hardship and the assessment thus effectively prevents the public release of this information. Laura Stevens Decl. at ¶ 14. This is not, however, the sole basis for the fee waiver request.

sponse to its records request.

- Any other information or evidence that SC intends to rely upon in support of its request for fee waiver.

Exhibit B, Port's July 8 fee waiver interrogatories, at 3.

Although disagreeing with the relevance of the majority of these interrogatories to its public records and fee waiver request, Sierra Club agreed to provide access to its non-profit incorporation status, its articles of incorporation, and Board of Directors information because the information was publically available. The information the Port sought regarding the Club's IRS forms 990 is also widely available online and the Club therefore directed the Port to that resource. Exhibit C at 6.⁸ The Port was similarly directed to the Club's articles of incorporation.⁹ *Id.* Sierra Club's nonprofit incorporation status was confirmed in the IRS Determination letter also provided at that time, attached hereto as **Exhibit K**. Additionally, the Club provided a link to biographical information regarding its Board of Directors which it later supplemented with a link to the profiles of the Board of Directors. *See* Exhibit C at 7, n. 5; Exhibit E at 2.¹⁰

The balance of the Port's interrogatories impermissibly inquired into factors not relevant to the fee waiver evaluation or subject matter that is private and is constitutionally protected, such as membership lists and financial information. The Port's requests were therefore objectionable and the Club refused to provide the information requested by the Port. *See, e.g.*, Exhibit C at 6-7. Courts do not typically distinguish between general members, funding sources and financial contributors when determining whether an organization's internal records require disclosure.¹¹ In fact, the Supreme Court has held the right of association "is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective." *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976) (internal quotations omitted). In general, "political parties have to have money and members, and anything which deters people from party support is detrimental to the party involved, regardless of what party it is." *Pollard v. Roberts*, 283 F.Supp.248, 257 (E.D. Ark. 1968), *aff'd* 393 U.S. 14 (1968).

The United States Supreme Court has long recognized that the right of association under the First Amendment is a "basic constitutional freedom," *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973), which, "like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). The Supreme Court recognizes that effective advocacy is often enhanced by group association. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). Thus, the "freedom to associate with others for the common advancement of political beliefs and ideas is... protected by the First and Fourteenth Amendments." *Kusper*, 414 U.S. at 56-57.

⁸ Sources such as <http://www2.guidestar.org> provide this information.

⁹ *See* Sierra Club Articles of Incorporation, <http://www.sierraclub.org/policy/articles/default.aspx>

¹⁰ Information about the Club's Board of Directors can be found here, <http://www.sierraclub.org/bod> and <http://www.sierraclub.org/bod/meet-the-board/default.aspx>.

¹¹ *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) ("Our past decision have not drawn fine lines between contributors and members but have treated them interchangeably").

Accordingly, the Port’s requests for the Club’s contribution sources and fundraising materials sought information that is constitutionally protected. Moreover, the sources of personal income for the Club’s Board of Directors is utterly irrelevant to the Club’s fee waiver request and the Port’s request for this information is abusive and appears intended to chill the public’s right to the requested information. How the Board members support their families has no bearing on any of the issues the Port must consider when evaluating the Club’s fee waiver request. This information was not disclosed by the Club.

Similarly irrelevant was the Port’s request for “all communications” between the Club and any other entity regarding coal use, storage or export. The request was overly broad, unduly burdensome, and was not relevant to the Port’s fee waiver inquiry. As such, the Club did not provide information responsive to it.

Additionally, the Port’s request for the identities of the Club members “who live within the boundaries of the Port District,” or recreate in the area, in addition to violating the constitutional parameters noted above, appeared to be premised on the mistaken belief that the Club must somehow establish “standing” to either make this request or qualify for a fee waiver. Such a position is incorrect. The OPRA clearly establishes that “[e]very person,” make invoke the provisions of the OPRA to seek access to “any public record” from “a public body.” ORS 192.420(1). The Act defines “person” to include “corporation, partnership, firm, [or] association.” ORS 192.410(2). There can be no dispute that the Club falls within the definition of “person” entitled to seek records under the OPRA and the Port’s inquiry regarding its membership’s use and enjoyment of resources in the Coos Bay area is irrelevant, overly broad and unduly burdensome and the Club therefore did not respond to this inquiry.

Upon being informed of the Club’s refusal to respond to some of its interrogatories for the reasons noted above, the Port’s response offered a number of rationales for its inquiries. *See* Exhibit D at 3-5. However, the Port’s letter betrayed a fundamental confusion regarding the legal standards applicable to a fee waiver request under the OPRA. For example, the Port claimed that:

The information requested by the Port is consistent with (and less than) the level of information that is generally available to the public regarding the Port as a public agency charged with operating in the public interest. It is somewhat ironic that SC would refuse to supply some of this requested information and instead maintain a shroud of secrecy over its funding, management and operations, in light of SC’s claim that it, and not the Port, is in the best position to determine what is or is not in the public interest.

Exhibit D at 4 (emphasis added).

The Port’s letter suggests that the fee waiver standard requires a requester of public information to be *itself* subject to the same standards of disclosure as the public body from which the records are sought. This is simply untrue. The Sierra Club is a not-for-profit entity, not a “public body” as that term is defined by ORS 192.410(3), and is thus not subject to the Oregon open records laws. The Port of Coos Bay is a public body under the OPRA. Oregon public records law does not support the type of “tit for tat” information exchange desired by the Port.

Additionally, the Port’s letter alleges that the “average tax payer [sic] in the Port District”

could review the Club’s request for records and waiver of fees and conclude “that the Sierra Club is adamantly opposed to the development of any Port facility that would be involved in the transportation of coal.” Exhibit D at 4. The Port then argued that “[i]t would not be unreasonable for that citizen to demand to know a little more about SC before agreeing to use his or her tax dollars to fund a response to this public records request.” *Id.*

However, the Port’s proposed “average taxpayer” test is not the fee waiver standard imposed by the OPRA or the court cases that have interpreted it. The Oregon Attorney General has made clear that a proper fee waiver analysis should focus on factors such as: the identity of the requester; the type of information sought; if the data is publicly available elsewhere, and; the nature of the planned use of the information and the scope of its intended distribution. Manual at 20. “[A] waiver or reduction of fees for the furnishing of a public record is ‘in the public interest because making the record available primarily benefits the general public’ ...when the furnishing of the record has utility—indeed, its greatest utility—to the community or society as a whole.” *In Defense of Animals*, 199 Or. App. at 189. A requester who has “identified why they wanted the [information], what they intended to do with it, [and] to whom they planned on distributing it” has made a *prima facie* case for a waiver and the burden rests on an agency to refute it. *Friends of the Coast Fork*, 110 F 3d. at 55. However, the Port’s inquiry and analysis scarcely addressed the issues central to a fee waiver decision. The Port’s stated rationale behind its interrogatories suggests an intent to intimidate public records requesters with irrelevant and invasive questions that carry the potential to chill public access to non-exempt information.

The Sierra Club has presented information covering all legally relevant factors in its submissions below, including a declaration from a Sierra Club staff member, Laura Stevens, attached hereto as **Exhibit L**, regarding the purpose of this information request and the Club’s abilities to disseminate such information. The requested information is relevant to the Club’s interest in coal and coal exports, and the associated health and community impacts of such plans for coal export in the Pacific Northwest. Additionally, the Club indicated in its initial information request that “our organization intends to use the requested information to benefit the public so the public can better understand the government’s activities related to using coastal property to export coal.” Exhibit A at 2. Accordingly, the release of the requested information will illuminate the Port’s operations and activities and thus further the purpose of the OPRA. The Club intends to analyze and distribute such information to the public through comments on public permits, and dissemination on websites and at meetings. Information about the Port of Coos Bay and its potential coal export plans is not publicly available making the information in this request highly beneficial to the community at large.

As the declaration of Laura Stevens notes,¹² the Club made this request in support of its Beyond Coal Campaign. Ms. Stevens is the Associate Organizing Representative for the Beyond Coal Campaign in Oregon. *See Stevens Decl.* at ¶ 2. To provide a context for this request information and fee waiver, she attests that:

Sierra Club is a nonprofit corporation incorporated in California, with more than 600,000 members and supporters nationwide, over 16,000 of whom reside in Ore-

¹² The Stevens declaration was originally provided in support of the Club’s fee waiver request as an attachment to its August 16, 2011 letter, Exhibit C.

gon. ... Sierra Club works with a number of environmental and human health issues related to air pollution, global climate change, and the use of coal. The state and national staff in the Portland office work with Sierra Club volunteers and members to carry out the Sierra Club's mission goals. Activities at the state level include, but are not limited to, transportation, coal, energy, climate change, public and private lands, outdoor activities, and environmental justice.

One of Sierra Club's significant conservation campaigns is the Beyond Coal Campaign...The campaign aims to move our economy toward a clean energy future by...keeping the massive United States' coal reserves in the ground and out of international export markets.

Stevens Decl. at ¶¶ 3, 4. As part of its Beyond Coal Campaign, the Club is focusing on Oregon, and the Pacific Northwest, in its efforts to restrict the export of coal for consumption elsewhere: "A significant part of this campaign entails working to keep coal in the ground, and since coal is being burned less in the U.S., keeping coal from being shipped to dirty power plants overseas from West Coast ports, such as those found in Oregon." Stevens Decl. at ¶ 5.

Addressing the environmental impacts associated with coal consumption and export, Ms. Stevens states that:

Whether mined, burned, or shipped overseas, coal is dirty, destructive, unhealthy and unnecessary to meeting Oregon's energy needs. We are already beginning to see mercury pollution in our heralded fisheries along with ocean acidification as a result of pollution from Asian coal-fired plants. Shipping coal to these foreign coal fired power plants will only speed climate change, which causes sea level rise and further damage our oceans; flooding; reduces snow [sic] pack in the mountains; causes more variable weather patterns; increases wildfires; increases the presence of invasive species, such as pine beetles; and increases the likelihood of storm events and storm surges along the coast. Additionally, mining and transporting coal for export causes problems like air and water pollution in the streams and harbors near coal export terminals and train tracks; coal dust contamination of the air and water near these export facilities; exhaust pollution from the numerous trains, ships and trucks needed to transport coal to the port and then abroad; fires from transporting highly explosive coal from the Powder River Basin; train derailments from coal dust accumulation on train tracks from shipping massive volumes of coal; and traffic impacts from the massive train traffic increases predicted with exporting millions of tons of coal each year. All of the negative impacts associated with climate change and with exporting coal will affect the quality of life [of] Oregonians and citizens of the Northwest.

Stevens Decl. at ¶ 7.

Ms. Stevens then describes the Club's intentions to use and disseminate the information:

Sierra Club intends to disseminate the information it receives through this FOIA request in the following ways: analysis and distribution to the media, distribution through publication and mailing to members and other community organizations,

posting on the Club’s website, emailing and list serve distribution to our members. In the past year the Sierra Club website had 40,730 visits and 100,381 page-views in the past year; on average the site gets 104 visits per day. Sierra Magazine, published bimonthly by the Sierra Club, reaches more than a million people across North America. Sierra Club Insider, our e-newsletter, is sent to over 850,000 people twice a month. In addition, Sierra Club disseminates information obtained through FOIA through comments to local permitting bodies, administrative agencies, and where necessary, through the judicial system. The Sierra Club has published, posted, and disseminated numerous articles on energy sources, their health and environmental impacts, and their alternatives. This includes information on our various webpages¹³...our press releases¹⁴... and information on the health and environmental impacts of coal.¹⁵ The Sierra Club Coal Free Oregon Facebook page...and the Coal-Free Oregon Twitter account...also convey similar information to the public.¹⁶ Meetings on coal exports that are open to the public and organized by the Sierra Club to inform the public, are regularly scheduled; these meetings have been publicized in a variety of ways, including online calendars....¹⁷ We intend to disseminate to the public the information requested in this matter using all these means of communication.

Stevens Decl. at ¶ 13.

The Sierra Club has a long history and demonstrated capacity to digest and disseminate the type of information requested in this matter to a large audience, as illustrated in Ms. Stevens’ declaration. Another example of the Club’s ability to analyze and distribute the type of information requested in this matter is a comprehensive report about the coal life cycle — mining, combustion, and waste disposal — all of which are the subject of Sierra Club’s records request. *See Exhibit M*, attached hereto. This 20-page report is derived from over 150 different sources which include highly technical information and policy documents.¹⁸ Similarly, the Club’s Oregon campaign webpage displays a comprehensive focus on the issue of coal exports with a discussion of Oregon-specific issues while providing links to other sources of information regarding matters of regional and national concern.¹⁹ Courts have found fee waivers were warranted for organizations with a sufficient ability to disseminate information to the public at large, and for organizations with an ability to digest complicated information.²⁰ The Club has an even greater ability to disseminate information than the organizations involved in these cases.

¹³ Such as www.coalfreeoregon.org, <http://www.sierraclub.org/coal/coalexport>, or www.beyondcoal.org

¹⁴ See <http://www.sierraclub.org/coal/or/pr/default.aspx>.

¹⁵ See, e.g., <http://beyondcoal.org/dirty-truth/> and here <http://www.sierraclub.org/coal/resources/default.aspx>

¹⁶ See Oregon Beyond Coal Facebook page, <http://www.facebook.com/OregonBeyondCoal?ref=ts>, and Twitter account, @CoalFreeOregon, <http://twitter.com/#!/CoalFreeOregon>.

¹⁷ See <http://oregon.sierraclub.org/events/>.

¹⁸ A shorter version of this report can be found here: <http://www.sierraclub.org/coal/resources/default.aspx>.

¹⁹ See <http://www.sierraclub.org/coal/or/default.aspx>.

²⁰ See *Forest Guardians v. US Dept of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005) (finding that Forest Guardians’ plan to disseminate information via an online newsletter reaching 2,500 people was likely to contribute to the public’s understanding of the operations of the government); *Western Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1038, 1040 (D.Idaho, 2004) (court used evidence of past analysis of complicated grazing management strategies to grant fee waiver associated with request for similar information)..

There are several examples of Sierra Club’s leading participation in the public dialogue about coal consumption and exports, as evidenced in several newspaper articles. *See, e.g., Exhibit N* (“Battle over coal for China highlights global economic change”); *Exhibit O* (“Environmentalists question coal’s place in Obama policy”); *Exhibit P* (“Enabling coal exports clouds environmental and economic goals”), all attached hereto. Ms. Stevens attests to many other recent examples in local print and internet media. *See* Stevens Decl. at ¶ 6.

As noted above, the Sierra Club intends to synthesize and disseminate the requested information to reach hundreds-of-thousands of people which supports a finding that disclosure of the requested information will contribute to the public’s understanding of coal exports and the associated health and community impacts in the Pacific Northwest. The Club expressly stated its intent to “use the requested information to benefit the public so the public can better understand the government’s activities related to using coastal property to export coal.” Exhibit A at 2. Accordingly, the release of the requested information will also illuminate the operations and activities of the Port and further serve the public interest. Courts have upheld much less detailed plans for dissemination, and do not require “concrete” or “particularized” plans for dissemination beyond a showing of intent and general capacity to do so.²¹

Additionally, as the Club stated its responses to the Port, the Sierra Club has no financial interest in the requested information.

Finally, the Club is not aware of any public domain source of the requested documents. *See* Stevens Decl. at ¶ 10. The Port’s fee assessment, if not waived “will therefore effectively bar the public’s access to this information,” because the Club “will not be able to allocate funds adequate to satisfy the Port’s financial demands.” Stevens Decl. at ¶ 14. As noted above, the Club does not base its fee waiver request solely on its inability to pay the Port’s fee assessment of tens of thousands of dollars, it is merely one of the factors supporting the waiver request. The Club has supported this fee waiver request with more than adequate documentation.

CONCLUSION

The Port did not satisfy the heavy burden carried by a public body seeking to withhold information under the OPRA. The Port has treated the disclosure exemption issue in a cursory and conclusory manner that has ill-served the purposes of the open records laws. It has completely failed to explain its assertion of the claimed exemptions or provide the “individualized showing of justification for an exemption” that is required under the Act. Additionally, it appears that the Port’s fee assessment is not reasonably calculated to recoup the actual costs of responding to this information request and is therefore unlawful.

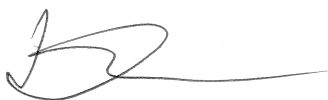
Further, the Port’s fee waiver interrogatories reach into constitutionally protected areas of First Amendment rights of association, information that is additionally entirely irrelevant to the proper evaluation of a fee waiver request under the OPRA. The majority of its interrogatories are also invasive and unduly broad and burdensome. Consequently, it appears that the Port’s re-

²¹ *Community Legal Services Inc. v. U.S. Dept. of Housing and Urban Development*, 405 F.Supp.2d 553, 557, n.3 (E.D. Penn. 2005). *See also Western Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (FOIA does not require unnecessary detail in describing intent to disseminate, especially without first being able to analyze the information).

quests for information are intended to unlawfully chill the free access to information under the OPRA rather than to serve the legitimate purpose of analyzing the Club's fee waiver request. Accordingly, while the Club willingly provided the information necessary for the Port to properly evaluate its fee waiver request, it did not respond to the Port's improper interrogatories. Although the Club provided more than the necessary level of documentation in support of its fee waiver request, the Port's correspondence makes clear that its fee waiver denial was based on improper standards, ignored the evidence in the record and is thus unlawful.

For the reasons expressed in this appeal, the Club therefore respectfully requests that you reverse the Port's decisions in this matter and order the information to be disclosed without charge. We would be happy to address any questions or concerns you might have.

Sincerely,



David Bahr



Jessica Yarnall Loarie
Sierra Club

Attachments

cc: Mike Stebbins, Stebbins & Coffey, Attorney for Port of Coos Bay