

# WASCO COUNTY

DISTRICT ATTORNEY

SUITE 304  
511 WASHINGTON STREET  
THE DALLES, OREGON 97058-2237  
PHONE (541) 506-2680  
FAX (541) 506-2681

ERIC J. NISLEY  
DISTRICT ATTORNEY

LESLIE C. WOLF  
CHIEF DEPUTY DISTRICT ATTORNEY

SARAH E. CARPENTER  
DEPUTY DISTRICT ATTORNEY

CHILD SUPPORT ENFORCEMENT  
(541) 506-2679

VICTIM ASSISTANCE  
(541) 506-2685

December 1, 2014

Mr. Paul Ferguson, IT Department  
Ms. Sue Stephens, Office Manager  
Wasco County Courthouse  
The Dalles, Oregon

Mr. Charles McHenry  
via electronic mail

Via interoffice Mail

Dear Ms. Stephens and Mr. Ferguson:

Oregon law provides for the District Attorney in each county to review certain matters pertaining to public records requests. This document is provided to you because you appear from the record to be the parties who have communicated directly with the person making the requests. Please feel free to forward this on to anyone you deem appropriate to receive it.

Dear Mr. McHenry:

If you have any questions about this document, you should seek advice of counsel. Oregon law prohibits me from giving legal advice. If you believe any of my factual assertions are incorrect, please advise me in writing, noting your objection as specifically as you can.

## FINDINGS

1. Mr. Charles L. McHenry submitted a letter to the District Attorney dated November 10, 2014 alleging a denial of a public records request. As I read the letter, I interpret it as either an appeal of a denial for production of records, or a request for a fee waiver or partial fee waiver. As District Attorney, it is my responsibility to review such appeals/petitions of denials or fee waiver requests. ORS 192.440;460.
2. IT Manager Paul Ferguson received the original request on October 10, 2014. The request identifies specific records, and requests those records in specific form, to wit: an electronic file of the information. The request contained two parts: first, all emails from Commissioner Rod Runyon containing the words "campaign" "contribution" and "donation." Second, all emails to and from Commissioner Rod Runyon and Commissioner Hege during a specified period of time.

3. The County, via Sue Stephens, responded on November 5, 2014, twenty-six days after the initial request.
4. Pursuant to ORS 192.440(2), a public body must respond to a written request for disclosure of public records. The response must include statements that the County possesses the records, and if it claims an exemption for certain records, the exemption claimed. The response from Wasco County references no exemptions apply to the material requested.
5. Mr. McHenry specifically requested electronic copy form. If a person requests material created in this form, it shall be provided in this form. ORS 192.440(3). In its response, Wasco County indicates the material will be provided in .pst format.
6. The County estimated its production costs for 2013 electronic pages at .25¢ per page; a fee of \$503.25. The County ordinance provides that providing content on media discs is \$15.00 per disc. WCO 14-002.
7. The County asserts that it will take three hours of work for the IT department to compile this information at \$120 per hour; a fee of \$360. The County Ordinance allows a maximum hourly search fee of \$40 per hour.
8. The County also asserts the need for eight hours of legal services for "Public Records Research" at \$40 per hour.
9. On November 14, 2014, I advised the recipient of the Public Records request, that an appeal had been submitted. I then directed that a copy of the records requested be provided to me. This is required by ORS 192.460.
10. On that same day, the records were provided to this office. All the records and two programs that allowed review of the records were provided on a single media disc.
11. On that same day, I inquired how long it took to compile the records. I was advised that it took less than one hour.
12. I have reviewed the records provided. It took just under two and one-half hours for me to review all of these documents. These documents will remain in my possession and will not be released by me to any person.
13. Mr. McHenry consented to a longer than normal time for my review due to my trial schedule and the Holidays.

#### Analysis

1. The \$503.25 fee for 2013 electronic pages is a violation of Oregon Law. The records were not requested in page format, but in electronic format. The County

stated it would provide the records in electronic format. The maximum charge per media disc is \$15. The material requested is created and stored electronically. There is no basis to charge a per page fee for these records.

2. The \$360 fee for “compiling the records” is excessive in that it quotes a rate triple that allowed by the County’s own Ordinance (\$40). Moreover, the actual time needed is one hour, not three hours. Thus, the maximum charge is \$40.
3. The County asserts it needs eight hours of “Public Record Research with legal counsel at \$40 per hour for review of records.” The County cannot lawfully charge for “time spent by an attorney for the public body in determining the application of the provisions of ORS 192.410 to 192.505” (exemptions). ORS 192.440(b). Furthermore, in its response, the County did not assert any exemptions applied to the records requested. ORS 192.440(2)(b).

Given that the County cannot charge legal fees for “Public Records Research” and that it has asserted no exemption, I cannot find any justification for eight hours of legal fees. Given the excessive fees that County attempted to charge for the electronic pages and the IT department time, this fee appears designed to discourage Mr. McHenry from pursuing his request. The fact that it took me less than two and one-half hours to review the material only compounds the issue.

4. A fee waiver may be granted when it is “in the public interest because making the record available primarily benefits the general public.” ORS 192.440(5). Such a circumstance exists when a matter affects the community as a whole, rather than a matter which is of interest for only a single private entity. In Defense of Animals. v. OHSU, 199 Or App 160, 187 (2005).
5. The only way to make this determination is by reviewing the records. While I cannot disclose their contents, the records requested contain communication between all three Commissioners. These communications relate directly to matters that were pending before the commission and appear to contain dialogue and possibly deliberation about matters of County concern. While an email amongst commissioners is probably not a violation of the Oregon Open meetings law, discussions about matters pending in email exchanges most certainly would be. ORS 192.670(1). I am not in a position to determine if a violation of the Oregon Open meetings law occurred. ORS 192.620 (open meetings law). However, because these records are held by the public and maintained and paid for by the public and relate to the conduct of publicly elected officials, the public’s interest in disclosure would significantly outweigh any claimed exemption or fee. The Oregon Court of Appeals defined public interest as “the right of the citizens to monitor what elected and appointed officials are doing on the job.” Jensen v. Schiffman, 24 Or App 11 (1976). The same analysis applies to the electronic emails from Commissioner Runyon’s email box that relate to his recent campaign.

## Conclusion


1. The fees sought by the County are excessive. By my calculation, applying the County's Fee Ordinance and the actual material and time needed to review the material, the total costs should be approximately \$150, if the County requires legal counsel to review the material. My review of the material suggests there are no valid exemptions, but the County may wish to continue to pursue review by an attorney. Without legal review, the cost is \$55.
2. Given the content of the material, it is in the public interest to waive the fees requested. This conclusion is considerably bolstered by the apparent attempt by the County to deter the person requesting these records by attempting to charge an excessive fee.
3. I also conclude that the County must provide these documents to Mr. McHenry. No valid exemption exists and given the nature of the records, the public interest in disclosure outweighs any such exemption even if one were asserted.

#### ORDER

Wasco County is hereby ordered to grant a complete fee waiver, because doing so would benefit the public interest. ORS 192.440(5). Wasco County is also ordered to provide the documents requested to Mr. McHenry without delay. If the County believes there is a valid exemption, it may submit the material in question to me, along with written argument supporting the claim for exemption.

The County may choose not to comply with this order, which will allow Mr. McHenry to appeal to Circuit Court here in Wasco County or in Marion County. ORS 192.450(2). If Mr. McHenry were to prevail in such a suit, Wasco County would be required to compensate him for the costs of the litigation at trial and on appeal, including attorney fees. ORS 192.490(3).

So ordered this 1<sup>st</sup> day of December, 2014.



Eric J. Nisley, District Attorney