

**'IF WASHINGTON AND CALIFORNIA AND IDAHO CAN MANAGE TO DO IT, ARE WE THAT MUCH LESS COMPETENT?
ARE WE DRAGGING OUR KNUCKLES THAT BADLY THAT WE CAN'T GET OUR ACT TOGETHER?'**

- DAVE BAHR, PUBLIC RECORDS LAWYER

CASH MONEY

The city of Eugene charged *EW* \$34.40 an hour for both City Manager's Office staff time (at five hours) and Planning staff time (eight hours) to collect emails. An interesting price point, considering that deputy recorder Chuck Crockett simply sent an email to Ruiz, Medary, Laurence, Piercy and City Council and requested they search their own emails.

Yes, the subjects in question were directed to search their own emails and forward Crockett what they found relevant.

The Kroger Report states that many other states "cap the hourly rate that can be charged for staff times, at levels that range between \$10 and \$25 per hour."

Abuse of fees by public officials was the largest concern of the journalists, lawyers and citizens *EW* spoke with about Oregon's public records law.

"Agencies in Oregon routinely use fees as a barrier to access," Bahr says.

Fees can include anything from copy charges to the hourly rate of lawyers brought in to review documents before being released to the public.

Walth says government bodies use "punitive fees to get records that already belong to us." He brings up a point addressed in the Kroger Report:

"The system of charging fees for public records provoked a significant amount of criticism in meetings around the state. Some raised a fundamental question: Why should the public have to pay the government to produce copies of documents that are already owned by the public?" the Kroger Report states.

It continues to explain citizen concerns about fees: "Even among those who recognize that fees may be appropriate, there is a perception that government officials can effectively block disclosure by imposing high fees for records."

That's not to say all fees are unwarranted. Fees are typically charged for compiling a request and, depending on the nature of the request, there are additional charges for printing or duplicating.

And, as Bahr points out, many smaller municipalities do not have staff or resources dedicated to completing public records requests.

So, for example, if a public records request is made by a group of researchers who will use the information to benefit the population at large, that should, according to the spirit of the law, qualify for a fee waiver — because it is in the public interest.

However, if a public records request requires hours of manpower and only serves the personal interest of the requester, many agree that in such a case a fee is appropriate.

Another common complaint is the lack of standardization of fees in Oregon. Public bodies can essentially charge what they please.

Perhaps the most prominent local case of out-of-control charges is that of *In Defense of Animals v. OHSU*, or Oregon Health and Science University, a case that Bahr worked on.

In the late '90s, *In Defense of Animals*, an animal protection org, made a public records

request about OHSU's experimentation practices on animals after a former OHSU employee alerted organization to unethical practices.

OHSU, a public body, put a price tag of more than \$150,000 on the public records request (the request was later valued at about \$12,000). After a five-year court battle, the Oregon Court of Appeals slapped down OHSU's fee as excessive and ordered it to release the records.

In fact, the case informed some of the fees section of the "Attorney General's Public Records and Meetings Manual" (the bible of Oregon public records hounds), stating that the AG has the authority to decide whether an agency is using a fee to "constructively deny the request, rather than to recoup the agency's actual costs."

Fines of this size are "going to prevent the public from having that information," Bahr says.

But fees need not be substantial to create a barrier. Look at the case of Harbaugh and his public records request to the Oregon Board of Psychologist Examiners (OBPE) after UO staff psychologist Shelly Kerr copied for UO attorneys the confidential records of the victim of an alleged gang rape by UO basketball players in 2014.

When OBPE director Charles Hill declared a closed hearing for the UO's appeal of OBPE's \$5,000 fine of Kerr for misconduct, Harbaugh requested to see the board's "Notice of Rights and Procedures" that gave Hill the authority to close such a hearing to the public.

Harbaugh says OBPE ignored his request for weeks and then came back to him with a fee of \$2.75 for the release of documents. Harbaugh calls this a transparent delay tactic, and the AG's office agreed, writing an order for the fee to be waived, warning OBPE about such methods in the future and charging OBPE \$500 for putting the Attorney General's office in the position of having to write such an order.

Harbaugh sounded off on this case to Rosenblum and Kron at the recent task force public hearing in Eugene May 9: "This was a transparent case of a state agency using fees not to collect revenue in any meaningful sense, not to offset the cost of preparing documents, but simply to delay the release of records that would be embarrassing to them."

Rosenblum says, across the board, fees should be affordable and more uniform. But don't expect changes any time soon.

"That is actually our third priority," she says. "We made more progress in the other two areas [deadlines, exemptions]. Costs — we may not be ready for that in this session."

WHO WANTS TO KNOW?

Bahr and Walth say that Oregon public officials systematically shut down fee waiver requests as a way to prevent potentially embarrassing or unscrupulous information from getting out.

In the spirit of OPRA, however, it is the recommended practice to waive fees if the request is deemed in the public interest. And, Bahr adds, the law as it was intended favors giving access to the media and research groups, as they help communities disseminate information.

Kron of the attorney general's office says that, in most cases, public records requests submitted by the media are considered in the public interest.

"I think most people would agree that if a reporter is making a request for records related to a story that they're working on to publish in the paper," he tells *EW*, "that that would certainly meet the public interest."

So, is Kesey Square in the public interest?

City Councilor George Brown of Ward 1, where Kesey Square is located, put it this way: "That's a public piece of property that's proposed to be privatized. It's clear to me from the testimony I've heard that, overwhelmingly, people want to keep it a public space and make it nice. That's definitely in the sphere of the public interest. You're removing a public asset by privatizing it, plus there happens to be the deed restriction that states very clearly that it has to remain in the public domain."

The city of Eugene, or rather its staff, disagrees.

Twice in early February 2015, *EW* asked the City Recorder's Office to waive the \$447.20 fee, reemphasizing that Kesey Square has consistently been in the press and part of the community discussion for months, and that *EW* would publish its findings from the results of the records request.

Crockett denied the paper's request to waive the fee. Crockett cited Administrative Order No. 21-05-06 F and stated that the "City Recorder's Office considers whether doing so is in the public interest because making the requested record available *primarily benefits the general public*. Based on this criterion, the City Recorder's Office has determined that a fee waiver will not be granted."

When pressed further about the public interest requirements needed to meet a fee waiver, Crockett did not respond.

"In Oregon it's almost universal that public bodies will deny fee waiver requests," Bahr says. "It's just the way it is, and it's horrible."

Bahr, in fact, says *EW*'s written request was not "bombproof" enough to elicit a fee waiver.

"I will spend 90 percent of my effort drafting the fee waiver," he says. Bahr explains while this is in no way what the law intended, Oregon's public agencies have put a high burden of proof on the requester.

And as both Bahr and Walth have pointed out, the discretion to waive the fee is always up to the agency. If a fee waiver is denied, the requester can appeal to the Lane County District Attorney's Office (for municipal and county agencies) or the attorney general at the Oregon Department of Justice (for state agencies).

Lane County DA Patty Perlow has been handling appeals to public record and fee waiver denials since she became a chief deputy in the DA's office in 2009. Perlow says that, in the DA's office, appeal decisions are based on "looking at history" and "legal precedents."

Perlow says Oregon public records law is due for reform. "I would like better guidelines on fees," she tells *EW*. And her advice for those seeking to appeal denials?

"If the appeal is just 'I didn't get my records fast enough,' it probably will not result in us