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Tom Harris
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Jason Bush
Assistant County Counsel
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VIA EMAIL ONLY

Re: Petition of Tom Harris, seeking a fee waiver or reduction for ballot images from the May 2022 election.

Dear Mr. Harris and Mr. Bush:

Petitioner Tom Harris made a public records request to the Washington County Elections Division (Elections) seeking ballot images from the May 2022 election. On September 8, 2022, Elections provided a fee estimate of \$65,223.50 to produce these images and denied his request for a reduction or waiver of fees. Petitioner now asks us to order Elections to grant either a full waiver or a "massive reduction" of fees, arguing that there is a great public interest in the records and that the estimate itself is patently unreasonable.

Mr. Harris is part of a small group interested in reviewing election data in Washington County. Prior to this request, another member of this group requested ballot images from the November 2020 election. On April 5, 2022, Elections estimated that the fee for 2020 ballot images was \$276.38. Now, just five months later, Elections is seeking \$65,223.50 for the same type of records (a more than two hundredfold cost increase for far fewer records).¹

The relevant data regarding these fee estimates is summarized below:

	November 2020	May 2022
Ballots	322,760	141,228
Setup fee	\$25.00	\$25.00
Per Record Cost	\$161.38 (\$0.00025 per image)	n/a
Review/Redaction	\$50.00 (one hour)	\$64,729.50
ITS Data Transfer	\$0.00	\$380.00 (4 hours)
USB drive	\$40.00	\$86.00
Total	\$276.38	\$65,223.50

¹ This office denied the fee waiver appeal in *Petition of Janice Dysinger*, April 21, 2022.

When asked to account for the cost difference, Elections referred us to Oregon Secretary of State (SOS) Directive 2022-2, issued May 3, 2022, on the topic of preserving ballot secrecy when responding to public records requests.² According to Elections,

The Directive specifically requires County officials to consider whether the requested data reveals **on its face** how a voter cast a ballot. This requires County staff to review each individual ballot to determine whether there are additional markings, notations or signatures on the ballot that would be in violation of ORS 260.695(9) as specified through the Directive....The difference in the estimated price stems from the Secretary of State's Directive to the Counties that essentially requires us to look at every individual ballot.³

Elections does not argue that the ballots themselves reveal the identity of the voter. Instead, Elections argues that each ballot must now be checked to ensure that individual voters did not place extraneous markings on their own ballots in violation of ORS 260.695(9)⁴, which might result in a violation of ORS 260.695(8)⁵ if such ballots were released in unredacted form.

Legal Standard

Under Oregon's Public Records Law, "every person" has a right to inspect any nonexempt public record of a public body in Oregon. ORS 192.314(1). "Generally, the identity, motive, and need of the person requesting access to public records are irrelevant." *Attorney General's Public Records and Meetings Manual* (2019) at 1. A public body may establish fees reasonably calculated to reimburse the public body for its actual cost in making public records available for inspection, including the costs of summarizing, compiling or tailoring the public records to meet the request. ORS 192.324(4). A public body may waive or reduce the 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 192.324(5). Even if waiving or reducing fees is in the public interest, an agency has the discretion to decide whether to grant a waiver or reduction. *In Defense of Animals*, 199 Or App at 189 (2005).

Any person who believes that their request for a fee waiver or reduction was unreasonably denied may petition the District Attorney for review. ORS 192.324(6). Although the District Attorney generally lacks the authority to review the reasonableness of a fee, a fee may be evaluated "where the amount of the fee in comparison to the nature of the request suggests that the true purpose of the fee is to constructively deny the request, rather than to recoup the agency's actual costs." *Manual* at 22. The agency carries the burden to sustain its action. ORS 192.411(1), ORS 192.415.

² Directive 2022-2, Office of the Secretary of State, Ballot Secrecy, May 3, 2022.

<https://sos.oregon.gov/elections/Documents/Directive-2022-2-ballot-secrecy-2022.pdf>

³ Declaration of Dan Forester, September 30, 2022 (emphasis in original).

⁴ "A person, except an elections official in performance of duties, may not do anything to a ballot to permit identification of the person who voted." ORS 260.695(9).

⁵ "An elections official, other than in the performance of duties, may not disclose to any person any information by which it can be ascertained for whom any elector has voted." ORS 260.695(9)

Analysis

As discussed below, we find on these facts that the amount of this fee in comparison to the nature of the request “suggests” that its true purpose is to constructively deny the request. In reaching this decision we considered (1) the amount of the fee compared to previous fee estimates, (2) evidence suggesting an intent to deter and/or constructively deny elections-related public records requests, and (3) whether the reasons for the fee increase are reasonable.

1. Amount of the fee compared to the previous fee estimate.

The cost increase from the estimate of \$276.38 for November 2020 ballot images to \$65,223.50 for May 2022 ballot images is striking. The current estimate is based on a fee of approximately \$0.46 per ballot for review and redaction. Many more votes were cast in November 2020 (322,760) than in May 2022 (141,228). If the current fee structure had been used to estimate the cost of producing the November 2020 ballots, that fee would have been \$148,422.67 instead of \$276.38, an increase of 53,600%.

A fee structure that produces an estimate of this size is suspect. We note that \$148,422.67 would pay the yearly salary of two Senior Administrative Assistants in Washington County. Based on our experience with large records requests, we cannot find that this ballot review, even if necessary, would consume two such employees for a year. We find that this fee increase alone “suggests” that the true purpose of the fee is to constructively deny the request.

2. Factors suggesting a motive to deter elections-specific records requests.

Other evidence suggests that Directive 2022-2 and this resulting fee estimate was motivated, at least in part, by a desire to ease the burden that elections-related records requests have imposed on elections offices statewide. According to numerous media reports, since the November 2020 election, statewide offices have been “flooded” with public records requests and threats of lawsuits which have imposed significant burdens on their operations. Some Oregon elections officials have expressed the view that these requests are made in bad faith and are motivated by dangerous falsehoods about the 2020 election.⁶ One article states that

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⁶ See e.g. Stringer, G. (2022, September 17). Oregon voter offices flooded with records requests from 2020 election deniers. *The Oregonian*. <https://www.oregonlive.com/politics/2022/09/oregon-voter-offices-flooded-with-records-requests-from-2020-election-deniers.html>; Selsky, A. (2022, September 19) Flood of records requests hampers Oregon elections officials. *Oregon Public Broadcasting*. <https://www.opb.org/article/2022/09/19/oregon-election-officials-elections-2022-secretary-of-state-shemia-fagan/>; Wong, P. (2022, September 20). Secretary of state: active effort must counter election lies. *Portland Tribune*. <https://pamplinmedia.com/pt/266-politics/558408-446833-secretary-of-state-active-effort-must-counter-election-lies>. For national media articles see e.g. Riccardi, N. (2022, September 16). Voter challenges, records requests swamp election offices. *Associated Press*. <https://apnews.com/article/2022-midterm-elections-voting-georgia-presidential-florida-df7f00418a35c70c9d53fa3a260111>; Gardner, A and Marley, P. (2022, September 11). Trump backers flood election offices with requests as 2022 vote nears. *The Washington Post*. <https://www.washingtonpost.com/nation/2022/09/11/trump-election-deniers-voting/>

the Secretary of State “said she is looking at ways for officials to respond to legitimate requests for public records *while they discourage requests* that are so extensive they cannot be fulfilled, let alone paid for.”⁷

This reporting demonstrates that elections officials strongly disapprove of elections-related public records requests. The purpose and timing of Directive 2022-2, the singular cause of the cost estimate at issue, must be evaluated in this context.

3. The reasonableness of the fee.

We are not convinced that Directive 2022-2 justifies this fee increase. The Directive did not change Oregon law on ballot secrecy. Both ORS 260.695(8) and (9) were applicable in April when the first estimate was made. The Directive simply restated existing law on ballot secrecy and instructed local elections offices to adhere to existing law when responding to public records requests. Elections does not argue that the printed ballot itself can reveal the identity of the voter, even if the ballot contains a rare combination of candidates.⁸ Instead, Elections is concerned that individual voters may have written personally identifiable information on their own ballots. As a result, Elections asserts that each ballot must be individually examined, for thirty seconds per image, to ensure that there are no such markings.

This is not persuasive. There is no evidence on this record to suggest how many ballots might contain markings that could identify the individual voter. We suspect that there would be very few. Oregon has utilized mail-in voting for over thirty years. Voters understand that they are not required to do anything to the ballot beyond inking a circle or adding a write-in candidate. Ballot secrecy is a core democratic principle, so we do not expect that many voters would choose to add unnecessary and unsolicited identifying information to their ballot. While there is no caselaw on this point, it is our view that the rare voter who chooses to add identifying information has effectively waived the right to secrecy under the statute. We are not, therefore, convinced that this concern justifies a lengthy hand search of each ballot.

Nor are we persuaded that the charge of \$380.00 for “ITS Data Transfer” is justified. We understand that these ballot images must be uploaded to a USB drive and that this data transfer will take time. However, it is not clear to us why an ITS employee, at \$95 per hour,⁹ is required to supervise this transfer. This added ITS cost alone exceeds the estimate for the November 2020 ballot images.

Conclusion

We conclude that under these facts the DA's Office has the authority to review the reasonableness of this fee estimate. Therefore, we issue the following order.

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⁷ Wong, 2022 (emphasis added).

⁸ Declaration of Dan Forester at 3.

⁹ This implies an annual salary of \$197,600 for this work.

Order

We grant the Petition with respect to the claim that Elections constructively denied Petitioner's records request by imposing an unreasonable fee. We therefore grant a fee reduction in this matter.

We find, as we did in *Petition of Janice Dysinger*, that the fee structure utilized for disclosure of the November 2020 ballot images is reasonable. We therefore order that Elections reduce their fee as follows.

Setup fee:	\$25.00	
Review/Redaction:	\$70.61	(\$.00025 per image)
ITS Data Transfer:	\$95.00	(reduced to one hour)
USB Storage Drive:	\$89.00	
	=	\$279.61

We acknowledge that a trial court with the benefit of a more developed evidentiary record may well reach a different conclusion on these facts. Elections has seven days to prepare a fee estimate consistent with this opinion or to announce its intention to seek judicial review. ORS 192.411 and 192.431 provide both parties the opportunity to litigate these issues in Circuit Court.

Sincerely,



Jason Ring
Deputy District Attorney

For Kevin Barton
District Attorney