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November 13, 2018

Peter Wood  
President  
National Association of Scholars  
12 E. 46th Street, 6<sup>th</sup> Floor  
New York, New York 10017

Krista Stearns  
Assistant General Counsel  
Portland State University  
P.O. Box 751  
Portland, Oregon 97207

Re: Petition of Dr. Peter Wood, on behalf of the National Association of Scholars, seeking a fee waiver from Portland State University

Dear Dr. Wood and Ms. Stearns:

In his public records petition, received by this office on November 1, 2018, petitioner, Dr. Peter Wood, requests that we order Portland State University (PSU) to waive fees associated with a request for records.

The underlying records request in this case, dated September 10, 2018, relates to an investigation by PSU into the conduct of Professor Bruce Gilley that Dr. Gilley, and others, allege is tied to his publication of a controversial academic article. In particular, petitioner asked PSU to provide him with:

- 1) The specific letter of complaint signed by 23 Masters of Public Policy Students that the university alleges was the basis for the launching of the investigation [of Professor Gilley]
- 2) The specific letter of complaint dated October 25, 2017 alleging discrimination against Dr. Gilley.
- 3) Any correspondence, whether by email or letter or otherwise, concerning Dr. Gilley between PSU's Dean of the College of Urban and Public Affairs, its University Provost, its Office of Global Diversity and Inclusion and/or its Department of Political Science between September 15, 2017 and June 15, 2018.

In response, PSU provided petitioner with the letter identified in item one, was unable to locate a responsive document for item two, and estimated that it would take 17 hours of staff time to produce documents responsive to item three. PSU quoted petitioner \$871 to complete that work and denied his request for a fee waiver.

For the reasons discussed below, we conclude that PSU did not abuse its discretion in denying the fee waiver as to item three and deny the petition.

## DISCUSSION

### A. Fee Waivers – ORS 192.324

ORS 192.324(5) provides that:

The 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 192.324(6) 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 or the district attorney in the same manner as a person petitions when inspection of a public record is denied under ORS 192.311 to 192.478. The Attorney General, the district attorney and the court have the same authority in instances when a fee waiver or reduction is denied as it has when inspection of a public record is denied.

An agency evaluating a requested fee waiver faces a two-step analysis. First, would making the records available primarily benefit the general public, that is, is it in the public interest. Second, if the request is in the public interest, the agency must then exercise its reasonable discretion to decide whether or not it will waive or “substantially reduce” the fees.

In reviewing an agency’s decision to deny a fee waiver, the district attorney may only determine whether or not the agency acted within the permissible bounds of discretion; we may not substitute our judgment for that of the agency. ORS 192.324(5).

In this case, PSU outlined the balancing it undertook in denying this request at length in its September 21, 2018 fee waiver denial sent to petitioner:

We are unclear how item 3 relates to the public interest at large. Furthermore, the time it would take to gather and produce the information requested is significant. You are requesting that we search not only email, but also paper records and other electronic records, generated over a 9-month period, of over 20 faculty members in the Department of Political Science and, separately of five administrators in the Office of Global Diversity and Inclusion over a 9-month period. The only search term to limit this request is "Gilley." A request this broad is predicted to generate hundreds, if not thousands, of emails/records on a host of topics, including day-to-day business of the political science department, course assignments, student matters, and department meetings, by way of example. And, most of those records are not matters of strong public concern and they will have nothing to do with the investigation you reference.

It is also likely that many of the records responsive to your request will not be records that the University is permitted by law to release to the public. You are asking for records that are likely to include education records of Oregon students protected by Family Educational Rights and Privacy Act; records that if disclosed would constitute an unwarranted invasion of personal privacy; and records that constitute personnel records exempted from the definition of public records.

This case has drawn the attention of multiple national academic advocacy organizations as well as various media outlets. This is a strong indicator of a general public interest in PSU's handling of the Professor Gilley matter.

Having found a public interest an agency must then look to the incremental advancement of that interest by the particular records request at issue as well as the burden that complying with that records request would place on agency resources. Here PSU has compellingly outlined that substantial scope of the request: all communications referencing "Gilley" over a nine-month period between approximately 25 different individuals. Of particular relevance, at least 20 of these individuals are within Professor Gilley's own academic department and can reasonably be presumed to have sent and received frequent incidental communication that include or reference Professor Gilley, but are of absolutely no relevance to the issue of interest.

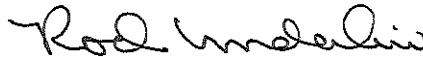
On this record, we cannot say that PSU acted unreasonably in denying petitioner's request for a fee waiver. The request would likely involve hundreds if not thousands of documents, the vast majority of which would not be relevant and many of which would be exempt from disclosure.

PSU has expressed a willingness to engage with petitioner regarding tailoring the scope of his request and, potentially, reduce fees as to a smaller set of records. We would encourage this consistent with our public interest determinations above.

**ORDER**

Accordingly, the petition is denied.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon