



**MICHAEL D. SCHRUNK**, District Attorney for Multnomah County

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July 28, 2000

Laurie M. Lown  
Outreach Coordinator  
In Defense of Animals  
6312 SW Capitol Hwy., #419  
Portland, OR 97201

James M. Mattis  
Legal Counsel  
Oregon Health Sciences University  
Legal Department  
3181 SW Sam Jackson Park Road, L-585  
Portland, OR 97201-3098

Re: Petition of Laurie M. Lown on behalf of In Defense of Animals (IDA) received July 19, 2000 to disclose certain records of the Oregon Health Sciences University (OHSU)

Dear Ms. Lown and Mr. Mattis:

#### BACKGROUND

On August 13, 1998, petitioner Laurie M. Lown on behalf of IDA requested Susan Smith of the Oregon Regional Primate Research Center to produce the following records:

- 1. IACUC meeting minutes with approved protocols from August 1995 to the present.**
- 2. IACUC semi-annual inspection reports from August 1995 to the present.**
- 3. Necropsy and pathology reports on any primates who died from August 1995 to the present.**
- 4. Your 'standard operating procedures' pertaining to primate care.**
- 5. Documents, including, but not limited to, correspondence, memos, and electronic communications, relating to USDA violations by ORPRC from August 1995 to the present.**

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6. **Documents, including, but not limited to, correspondence, memos, and electronic communications, relating to non-experimental primate deaths from August 1995 to the present.**
7. **Internal complaints relating to primate care from August 1995 to the present.**
8. **Daily logs pertaining to primate care from August 1995 to the present.**

On September 16, 1998, OHSU Associate Director, Comparative Medicine, Bryan E. Ogden, D.V.M., responded with cost amounts for items 2 and 4 and noted that it "will take us additional time to provide you with a reasonable estimate of the volume and costs associated with providing most of the requested information. In addition, would you please be more specific about request number 8." On October 6, 1998, petitioner withdrew the request for item 4 and clarified the request for the daily logs in item 8.

OHSU submitted a lengthy cost breakdown for the seven remaining items in a letter dated October 27, 1998. The requested reimbursement totaled \$13,056.10. Correspondence from IDA during this period sought clarification on item 3, rejected the charge for item 8 (\$12, 585.40), and requested an opportunity to view the latter documents. Petitioner submitted a check for \$293.90 to cover the costs of items 1, 2, 5, 6, and 7 and received those documents on January 6, 1999.

In a February 10, 1999 letter, OHSU submitted a revised cost bill. IDA would now be required to pay \$898.75 to obtain item 3 (originally estimated to be \$176.80) together with an additional \$673 for the already distributed documents. Petitioner objected to the proposed fees and sought a partial or complete fee waiver. OHSU eventually agreed to waive the \$673 additional fee for items 1, 2, 5, 6, and 7. In subsequent correspondence, OHSU took the position that the total charges for providing all the items (except for item 8) amounted to a 36% partial reduction. It was described as "a generous contribution of limited public funds and far beyond the amount we understand other public bodies provide in similar circumstances." See letter dated July 16, 1999.

Petitioner and OHSU exchanged letters in November and December 1999 voicing disagreement over the need for redaction of the necropsy and pathology reports (item 3) and the reasonableness of the costs in making those records available. This petition challenges the \$898.75 fee for item 3 as well as the \$673 charge increase for items 1, 2, 5, 6, and 7. Petitioner is not at this time appealing the disputed charges for item 8. See Petition, page 2.

OHSU legal counsel James M. Mattis submitted a letter response to this office on July 21, 2000 (attached). Mr. Mattis first notes that the Primate Center did reduce its charges by \$673. He then asserts that even if "IDA has stated a good case that a further fee waiver or reduction is in the public interest, the Primate Center believes it has more than accommodated IDA in this regard by waiving \$673.00 worth of actual costs." Mr. Mattis then points out that the expense in producing

the records for item 3 "will require diverting a veterinarian's time and attention from caring for the primates." The veterinarian will be reviewing records "to determine which ones are records of primates which died from natural causes." These documents must then be reviewed by someone "to redact private proprietary information." Mr. Mattis states that approximately 500 more records were reviewed "from what was originally requested to be reviewed."

Mr. Mattis admits that the \$100 per hour figure used in calculating the actual costs to produce the documents was overstated. The revised cost is \$801.66 for item 3 (down from \$898.75) and \$810.46 for items 1, 2, 5, 6, and 7 (down from \$966.90). OHSU now calculates the reduction in total costs for items 1, 2, 3, 5, 6, and 7 (labeled a partial fee waiver) to be 32%. See attached follow-up letter dated July 26, 2000.

## DISCUSSION

### **I. Actual cost.**

The Public Records Law expressly authorizes a public body to establish fees "reasonably calculated to reimburse it for its actual cost in making such records available." ORS 192.440(3). The public body is permitted to include in its fees "costs for summarizing, compiling or tailoring [a] record, either in organization or media, to meet the person's request." ORS 192.440(3).

"Actual cost" may include a charge for the time spent by the public body's staff in locating the requested records and "a public body may preliminarily estimate charges for responding to a records request and require prepayment of the estimated charges before acting on the request." Attorney General's Public Records Manual, 1999, page 12.

The public agency may provide the records without charge or at a reduced fee "if the custodian determines that the waiver or reduction is in the public interest because making the record available primarily benefits the general public." ORS 192.440(4).

In a February 10, 1999 letter to IDA, Dr. Ogden described the necropsy and pathology reports (item 3) as "at least 694 pages and the process of locating and sorting them for copying and shipping has required much more labor than estimated." IDA responded in its March 25, 1999 letter by noting that it was prepared to pay "reasonable costs of duplication of these materials." OHSU replied with a partial fee waiver of \$673 and, in a July 16, 1999 letter, with a breakdown of its actual costs. Dr. Ogden noted that if IDA "would like to shorten the period of time covered by your request, the cost would go down."

This office has carefully reviewed the November 5, 1999 letter from IDA challenging the good faith and accuracy of the cost figures of OHSU. We are not in a position to second-guess the work product of Dr. Ogden and his associates, in light of the "marked increase in public records requests"

that have occurred in the two years since the Primate Center became a part of OHSU. It should be expected, however, that experience will now assist OHSU in dealing more responsively with problems such as the unresolved IDA request for the electronically maintained daily logs (item 8).

## **II. Public interest.**

The public agency may provide the records without charge or at a reduced fee "if the custodian determines that the waiver or reduction is in the public interest because making the record available primarily benefits the general public." ORS 192.440(4). There are two public interests involved here.

IDA describes itself as a non-profit organization "dedicated to ending the institutionalized exploitation and the abuse of animals by defending their rights, welfare and habitat. As such, IDA frequently conducts intensive information dissemination campaigns that serve the public interest." See letter dated November 5, 1999. IDA intends to submit a report to Congress on the conditions of primates in the national primate center system and then disseminate it to the general public in its newsletter and web site.

Counsel Mattis for OHSU points out that "IDA is one of many animal rights groups which request records from research institutions." He complains that the financial burden of providing records is steadily increasing. Mr. Mattis argues that "the Primate Center cannot subsidize animal rights groups or allow their requests to interfere with its business of conducting federally requested and approved research in the public interest of improving human health."

A balanced approach must be taken when extensive requests for voluminous documents are presented to a public agency ill-equipped to deal with such demands from citizen watchdog groups. A broad comprehensive request may place unreasonable burdens on the custodian of records. Expectations of a fee waiver must necessarily diminish when simple retrieval and duplication efforts turn into the need for elaborate professional review and redaction of sensitive documents. With that said, we conclude that it is in the public interest for OHSU to provide as many documents as possible at the least possible cost to petitioner.

## CONCLUSION


One underlying problem in this controversy is the lack of effective communication between representatives of IDA and representatives of OHSU. Given the relatively low dollar cost involved in this petition, we have some concerns about the parties' considerable expenditure of resources arguing over fees without any words of compromise. However, we are not prepared to say there has been an abuse of discretion in the decision of OHSU not to expend its limited financial resources by granting petitioner a further fee waiver. We urge IDA and OHSU to begin a dialogue in the spirit of cooperation and in the knowledge that there will be similar public record requests in the future.

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ORDER

Accordingly, it is ordered that the petition of petitioner Laurie M. Lown on behalf of IDA for a waiver of fees for the production of records of OHSU and the Primate Center<sup>1</sup> is denied.

Very truly yours,

  
MICHAEL D. SCHRUNK  
District Attorney  
Multnomah County

Cc: Dave Bahr, Attorney at Law

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<sup>1</sup> Although the Primate Center is located in Washington County, it is admittedly part of OHSU. Counsel for OHSU does not dispute that OHSU, the public agency ultimately responsible for disclosure of any records of the Primate Center, is located in Multnomah County.