

Memorandum in Support of
Petition for District Attorney's Review of
Denial of Production of Public Records and
Denial of Waiver of Fees

Factual Background

I, Denise Krause, am a well-known community leader in Jackson County, Oregon. I ran a competitive campaign for a seat on the Board of Commissioners (BoC) in 2022, and was elected to the Board of the Rogue Valley Transportation District in 2023. I am the Chief Petitioner on three initiative petitions to place measures regarding the BoC on the November 2024 ballot. Those petitions were developed through a grassroots, nonpartisan process launched early in the summer of 2023. Numerous other community leaders, including Dr. Dave Gilmour (BoC member 2002-10), Al Densmore (33 years of public service; 2022 BoC candidate), Alan DeBoer (Ashland Mayor, Oregon State Representative and Senator), and Bill Thorndike (Medford businessman and community leader) were involved in the advisory process. The proposed petitions were submitted to the County Clerk on July 28, 2023, and approved for circulation on September 15, 2023.

Surely this process was known to the current members of the BoC and senior County Administrators Danny Jordan and Joel C. Benton.

The petition designated "Jack 23-03" would allow Jackson County voters to address the extremely high and automatically-escalating salaries collected by Commissioners. In order to respond accurately to inquiries from the general public and the media, and to educate the citizens who are exercising their First Amendment and statutory rights by circulating or signing Jack 23-03, on August 30 I submitted a public records request (PRR) (Attachment 1) pursuant to ORS 192.314(1):

Every person has a right to inspect any public record of a public body in this state.

Like other citizens who seek to exercise this right in Jackson County, I could not predict what fee, if any, Jackson County might demand, because the County has failed to comply with ORS 192.324(7)(b):

A public body shall make available to the public a written procedure for making public records requests that includes [t]he amounts of and **the manner of calculating fees** that the public body charges for responding to requests for public records (emphasis added).

The "written procedure" – "Cost + Overhead" – available on the County's website prior to the week of October 9 is Attachment 2. Recently the County entirely revamped its website and moved it to a new domain. No such "written procedure" can now be found.

On September 5 I received the following email response to my PRR:

Good Morning Denise,

We have received your request which will require some research. I will respond within 10 business days with more information and a fee estimate.

Thank you,

Lisa Valencia

Recruitment Specialist

Human Resources Office

I replied that same day:

Thank you, Lisa.

I realize that the information I requested is publicly available and of general public interest.

I would like to request a fee waiver based on the fact that:

- 1) it will be quick and expeditious for a professional to pull the requested data from a computerized payroll system and,
- 2) providing access to this information primarily benefits the general public as taxpayers are responsible for funding the positions, and as it pertains to an upcoming election.

I assume you will respond within 10 business days of my request date of August 30.

On September 14, the very end of the 10-day window prescribed by Oregon law, Ms. Valencia sent the following email; clearly it was not authored by her:

Good afternoon Ms. Krause,

In response to your email dated Tuesday, September 5, 2023 requesting a fee waiver to your public records request. Your request does not meet the guidance from the OR DOJ on waiver or reduction of fees. In assessing requests for fee waivers and reductions, Jackson County follows the criteria set forth in section I(D)(7) of the Oregon Attorney General's Public Records and Meetings Manual (the AG's Manual). ORS 192.324(5) provides that the "custodian of a 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."

Among the criteria described in of the AG's Manual for considering whether a waiver is in the public interest, section I(D)(7)(b) directs a public body to consider whether "furnishing of the record has utility... to the community or society as a whole," and, further, "[r]egardless of how interested the public may be in the matter the requested records relate to, if the requester fails to demonstrate the ability to meaningfully

disseminate the information, disclosure will not primarily benefit the public.” Using this guidance, the County has typically only granted fee reductions or waivers to requesters who have demonstrated the ability to disseminate the records or information to wide audiences, such as requesters who represent established newspapers and media outlets.

While the public may have expressed an interest in the subject of your records request, you have not demonstrated an ability to meaningfully disseminate the information. As such, the disclosure will not primarily benefit the public and the request for a fee waiver or reduction is denied.

Therefore, I have attached an invoice for your request. You should be aware that the salary information will not include the names of the Commissioners, but salaries will be reflected as “Commissioner 1, Commissioner 2, Commissioner 3.” We will proceed with the request when we receive payment.

Thank you,

Lisa Valencia

The referenced invoice is Attachment 3.

Again, I immediately responded on the same day:

Thanks for your response. I am actually preparing this public data for county-wide dissemination in the local newspapers, radio, social media, presentations, and other media outlets. The audience is the whole county through multiple means of dissemination. The audience is as wide as you can get. The data has been requested of me by established newspapers and media outlets.

Please proceed with the request.

The next email, purportedly from Ms. Valencia, arrived on September 15:

Can you please clarify what you mean by we may proceed with the request? Do you mean that you have withdrawn your request for a fee waiver? If not, then the County’s decision to deny your request for a waiver or reduction in fee stands. As set forth in my previous email, the Oregon Attorney General’s Manual directs the public entity to look at the requestor’s ability to disseminate the records to the public. If one of the newspapers or other media establishments with whom you are working with wishes to request the documents directly and ask for a fee waiver or reduction, we would, of course, consider that as to their ability to meet the standards set forth in the Manual. However, based on your email, you have not shown an ability, as the requestor, to disseminate the information to the public at this point. If you

have any further information you'd like the County to consider in reviewing your request for the fee waiver or reduction, please feel free to provide it for our consideration.

If you have any further questions, please feel free to contact Joel Benton, County Counsel, at bentonjc@jacksoncounty.org.

Thank you,
Lisa Valencia

Finally, the controlling role of County Counsel, an attorney, was disclosed. Why the prior pretense that I was communicating with a "Recruitment Specialist"? Why did Benton fail to determine if I was represented by legal counsel?

On October 17, I provided even more detail to demonstrate my proven ability to employ and disseminate the information requested through multiple channels and modern means, ultimately reaching every voter in Jackson County:

I am writing to renew my request that Jackson County waive the fee demanded to provide the information requested regarding Commissioners' compensation. The requested records are of great interest to Jackson County's citizens and taxpayers and will be disseminated through numerous different media outlets, including:

The Jackson County For All website: www.jacksoncountyforall.org
The Jackson County For All Facebook page.

Indeed, consider the pending public records request to be made on behalf of these social media outlets. Additionally, the information requested will reach the public through:

Radio stations such as JPR, KSKQ, and others requesting interviews.
Note that JPR has already laid the foundation in two recent broadcasts of The Jefferson Exchange.

Opinion columns and letters to the editors in The Rogue Valley Times, Grants Pass Daily Courier, and Ashland News.

Television outlets such as KOBI-5 and others.

Open public forums

Ultimately, the information requested will reach every single voter in Jackson County -- in the Voters' Pamphlet. In less than one month, the Jackson County For All petitions secured over a quarter of the required number of 10,500 signatures. The initiative measure concerning Commissioners' compensation will be on the 2024 ballot. By answering my pending request, the information will be

available to all local media outlets. Otherwise, the County will be responding to dozens of separate public records requests from each individual outlet.

I look forward to receiving the requested information.

Thank you.
Denise Krause, PhD
Campaign Manager
Jackson County for All

Mr. Benton, wearing both hats as Senior Deputy County Administrator and County Counsel, had the last word on October 23 [grammar as in his original]:

As Ms. Valencia wrote on September 14, 2023, your request for a fee waiver or reduction does not meet the standards set forth in the Oregon Attorney General's Public Records and Meeting Law. The interest or lack of interest of a particular matter is only part of the analysis of whether or not a request for a waiver or reduction of a fee is appropriate. As Ms. Valencia wrote, the standard in analyzing such a request includes, regardless of how interested the public may be, the requestor must demonstrate the ability to meaningfully disseminate the information.

In review your request for a reconsideration, the County can only look at the "requestors" ability to meaningfully disseminate the information. As the local media has not made the request, and you have, our analysis is not based on JPR, KOBI 5 or others, who have not made the request, ability to disseminate the information. If any of those entities make a public records request, and request a fee waiver or reduction, our analysis would focus on their ability in such a case. Similarly, I don't find any support for the granting of a fee waiver request for the placing of a statement in a voter's pamphlet as meeting the AG's standard of the requestor being able to meaningfully disseminate the information, as similar to the media, that would be the County Clerk disseminating the information, not you as the requestor.

The AG's Manual does not provide guidance on what appears to be your specific means of disseminating information to the public – namely a privately owned webpage and a facebook page. However, in looking at the provisions of the Oregon Public Records Law – which expressly permit public entities to recover actual costs incurred in a public records request – and the specific standards for an exemption to paying those fees – being that the matter is in the public interest and the requestor has the ability to meaningfully disseminate the information, I do not believe that only having a website and a facebook page satisfies that standard. If that were the case, public entities would likely be unable to recover their actual costs in responding to public records request in the vast majority of requests, as the creation of a facebook page is free and the establishment of a webpage can be fee or of very minimal cost. Further, the mere existence of a

webpage or a facebook page does not, in my opinion, demonstrate the ability of a requestor to meaningfully disseminate the information request.

As such, the County has reconsidered and again denies your request for a fee waiver or reduction of the cost of providing the records sought in this request.

Joel C. Benton
Senior Deputy County Administrator/County Counsel

To date, I have been interviewed at length on JPR and KSKQ (a full hour), reaching thousands of Jackson County citizens. The Rogue Valley Times, Ashland.news, and the Grants Pass Daily Courier have published articles about the petition drive. KOB1-5 and KMVU FOX-26 have aired segments. I *personally* have met face-to-face with over a thousand citizens. The campaign has reached well over 10,000 people already.

Analysis

"Oregon has a 'strong and enduring policy that public records and governmental activities be open to the public.'" *Kluge v. Oregon State Bar*, 172 Or App 452, 455, 19 P3d 938 (2001), quoting *Jordan v. MVD*, 308 Or 433, 438, 781 P2d 1203 (1989).

1. Jackson County, Jordan and Benton wrongfully and unreasonably denied my request for a fee waiver, through their "put on blinders" policies and practices.

First, Benton failed to use the proper legal standard. Whether a requester has demonstrated the ability to meaningfully disseminate information is not a matter of his personal opinion. A "public body's decision whether to grant or deny a fee waiver or reduction must be reasonable. Reasonableness is an objective standard, under which we examine *the totality of the circumstances* presented." *In Defense of Animals v. OHSU*, 199 Or App 160,190, 112 P3d 336 (2003) (emphasis added).

Benton asserted (through Valencia) that the County typically waives PRR fees only for "requesters who represent established newspapers and media outlets." He suggested that the County would more favorably consider a request for *the very same information* if made by that narrow category of corporate interests rather than a citizen engaged with her community in a grassroots project exercising First Amendment rights. He eventually created a new policy, that social media outlets and websites can be ignored. He refused to look at the totality of the circumstances, ignoring the realities of modern communication. These acts and practices are discriminatory, inefficient, senseless and contrary to the word and spirit of Oregon law.

"A public body may not exempt itself from its responsibilities under the Inspection of Public Records law by adopting a policy that seeks to deprive citizens of their right under the law to inspect public records." *Guard Publishing Co. v. Lane County School Dist.*, 310 Or 32, 39, 791 P2d 854 (1990). But that is exactly what Benton and the County have attempted to do, historically through a practice of presumptively favoring corporate

media entities over other requesters, and now by refusing to consider the facts in this case and the reach and utility of social media.

Benton (through Valencia) repeatedly invokes the Attorney General's Manual as his sole authority for this restrictive approach. He is incorrect when he says the Manual does not provide guidance about websites and social media. In particular, *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309 (DC Cir 2003), the legal authority on point endorsed by the Manual in footnote 124, undermines Benton's reasoning and "opinion." *Judicial Watch* ruled that the requester adequately described how it would disseminate information in *nine different ways*:

1. Press releases (in other words, disseminating through outlets like JPR and KOBI)
2. A newsletter (the petition drive issues regular newsletters)
3. A website
4. A "listserv" (today's equivalents are Facebook and similar social media)
5. Congressional testimony
6. Helping produce television shows
7. A weekly radio show broadcast by stations that were not the requester
8. Appearances on other television and radio programs
9. Conferences

My waiver request rests on comparable bases in all nine respects, except perhaps #5 (but I would not rule out testimony before the Oregon Public Records Advisory Council or the Oregon Legislature).

More importantly, let's go back to the controlling statute. This is the law, not the Manual. ORS 192.440(4) provides for a fee reduction or waiver when it is "in the public interest because making the record available primarily benefits the general public." This means disclosure to the requester, not to an intermediary such a media outlet. The statute does not support any further test limiting how the requester may disseminate that information to the general public. The statute does not support giving a presumption favoring corporate media over citizens. Providing my requested information will overwhelmingly benefit the general public by supporting the First Amendment and Oregon statutes which enable the public to engage in political discourse and action through initiative petitions. Benton and the County cannot be allowed to shut down this democratic process by unreasonably burdening access to public information.

Benton also erred by weighing cost-recovery by the County over the public's rights. *In Defense of Animals*, 199 Or App at 188, dealt with a similar situation where the public entity refused to look broadly at all factors supporting a waiver request, and instead was motivated by "the inconvenience and financial detriment to it of furnishing the records." Clearly, the AG's Manual is not controlling law. It is "the Public Records Law [which] as a whole embodies a strong policy in favor of the public's right to inspect public records." *Id* at 189-90. That policy was violated when Benton invented a rule to disregard the full means available to a requester to disseminate information so that the County need not worry about collecting fees.

2. The County's PRR fee methods violate ORS 192.

Valencia constructively denied my PRR by demanding an unreasonable fee which contravenes controlling statutes and public policy. When Valencia acknowledged receipt of my PRR on September 5 she noted that it would “require research.” The County's “written procedure” at that time said merely this about research fees: “Cost + Overhead (¼ hr Min).” On September 14 she presented an invoice for “HR Research (3 hours Cost + OH) \$284.64.”¹ That's almost \$95 per hour.

It turns out that Jackson County's *ad hoc* PRR fees range unpredictably all over the place, from \$75 to as high as \$153 per hour to my knowledge. Why? Because the County has decided to maximize “cost recovery” beyond its actual costs. It uses a “fully burdened compensation rate” for whatever employee it selects to do the research, which includes “accruals” beyond costs actually incurred, and then piles on departmental and countywide “overhead” consisting of set costs already covered by general County revenues. This complicated accounting artifice (which the County has refused to explain in any greater detail) is then divided by the *average productive hours* it has somehow determined it receives annually from the *average county employee*, *not* the employee actually performing the research.

This opaque and loaded method violates ORS 192.324(4)(a): “A public body may establish fees *reasonably calculated to reimburse* the public body for the public body's *actual* cost of making public records available (emphasis added).” A bookkeeping accrual entry for a possible contingent or future payment cannot be “reimbursed.” The statute allows only reimbursements, not banking for possible future payouts.

Summing up all conceivable, indirect expenses of an employee for an entire year and dividing the result by the “productive hours” of a hypothetical “average” employee is not a fair or sensible method to compute the *actual costs* of complying with a specific PRR. Moreover, I and other taxpayers already cover departmental and County overhead (the desks, electricity for heat or A/C, etc.) These are set, pre-funded costs that are in no way increased by a PRR. There is no payment made as a “cost” of handling a PRR that can be reimbursed.

The burden is on Jackson County to show that its PRR fees demanded are reasonably related to its actual costs. In *Davis v. Walker*, 108 Or App 128 (1991), the public body based its fees on “an accounting procedure” which was much simpler than that used by Jackson County, although at least it was in writing. No study had been done to determine “actual costs.” The court held that the public body failed to meet its burden to prove its fees were reasonable. See also *In Defense of Animals*, 199 Or App at 183-84 (criticizing *ad hoc* approach to PRR fees);

¹ Note that if only 5 or 10 minutes are required to answer a PRR, the County is already over-reaching beyond its actual costs.

Further evidence that Jackson County's PRR fees are unreasonable is how grossly inflated they are over other Oregon entities that publish specific rates, properly informing the public in advance:

| | Josephine County | OR Governor | OR DOJ |
|--------------|------------------|-------------|----------------------|
| Clerical | \$32 | \$20-25 | \$47 |
| Professional | \$45 | \$32-40 | \$79 (paralegal, IT) |
| Managerial | \$55 | \$60-75 | |

My request can easily be processed by clerical staff. If I lived one county to the west, the opening demand would be \$32 not \$95 per hour. From the Governor, as low as \$20! Jackson County should not impose such unreasonable fees. In this case, the proper result can be reached by waiving them.

3. The County is in continuing violation of ORS 192.324(7)(b).

The County's fees should be waived while it continues to be in violation of the requirement to provide the public with a written procedure explaining “the manner of calculating fees.” “Cost + Overhead” was never adequate to satisfy that statutory directive. Even that phrase has now disappeared from the County's new website, whether searching in Services, Documents & Forms, or All of Jackson County:



Indeed, it is impossible to find information about public records requests at all. Searching that term generates 10 pages of inapplicable results. Where is the PRR information needed by the public hiding?

* * * * *

I request that the District Attorney 1) order that the fees for my PRR are waived, and 2) that the County must immediately provide the records requested. Thank you for your assistance in this matter.