



CRAG LAW CENTER

LEGAL AID FOR THE ENVIRONMENT SINCE 2001

July 2, 2021

Via certified mail and online system

Attorney General Ellen Rosenblum
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096

Re: Request for Public Records Disclosure Order – ODOT Wildfire Debris Removal Records

Dear Attorney General Rosenblum:

This office represents Cascadia Wildlands (Cascadia) in connection with its public records requests seeking Oregon Department of Transportation (ODOT) records relating to the 2020 wildfire debris removal program. As set forth below, Cascadia respectfully petitions for an order requiring ODOT to reduce its fee estimate for production of the requested records and/or reversing ODOT's fee waiver denial.

ODOT is in the process of using hundreds of millions of federal and state dollars to remove hundreds of thousands of trees along public roads and public and private properties that burned in last year's wildfires. Despite the considerable amount of taxpayer dollars at issue, and the impacts of these actions on Oregonians and Oregon's public forests, ODOT was largely nontransparent regarding its allocation of funds and its contracting process. This spring, individuals and organizations came forward with allegations of mismanagement of the funds and excessive tree cutting.¹ As a nonprofit conservation organization with a mission to defend and restore Cascadia's wild ecosystems for all Cascadians, Cascadia was concerned about this work. Therefore, Cascadia submitted a public record request to review the records relating to the debris removal and investigate ODOT's tree-cutting along scenic highways and protected rivers.

Cascadia requested that ODOT provide copies of records pertaining to hazard tree removal following the fall 2020 wildfires across the state, including records of guidance for assessing criteria for hazard tree removal. Additionally, Cascadia requested all FEMA documentation, criteria, and contracts with contractors with whom ODOT entered into agreements for hazard tree removal activity. In accordance with Oregon public records law, Cascadia requested that ODOT

¹ Profita, *Controversial hazard tree removal project sparks protests*, OPB, (MAY 5, 2021 4:45 PM), <https://www.opb.org/article/2021/05/05/oregon-tree-removal-protests-environment/>; Tran, *Oregon's management of post-forest-fire cleanup must change*, KATU ABC 2, (Jun. 26, 2021), <https://katu.com/news/local/opinion-oregons-management-of-post-forest-fire-cleanup-must-change>; Sickinger, *Independent expert gives state hazard tree removal program clean bill of health*, THE OREGONIAN/OREGONLIVE, (Updated Jun 08, 2021; Posted Jun 07, 2021) <https://www.oregonlive.com/wildfires/2021/06/independent-expert-gives-state-hazard-tree-removal-program-clean-bill-of-health.html>.

waive its fees associated with complying with the records request. ODOT provided Cascadia with an estimate of over \$87,000 to provide the records and denied the fee waiver request. Cascadia now respectfully requests an order reversing ODOT's decision for three reasons.

First, ODOT's fee estimate is unreasonable and unjustified and should be reduced or remanded to ODOT for reconsideration, as the fee amounts to a constructive denial of the request. Second, ODOT should waive its \$87,756.60 fee because making the records accessible primarily benefits the general public. The information that Cascadia seeks is a genuine public interest and will be used to inform and educate the public at large about the controversial hazard tree removal that is currently occurring on Oregon's public lands. Finally, the Attorney General should reverse the fee waiver denial because Cascadia's request will serve the purposes of the Highway Fund's dedication in itself and encourage responsible public administration of the Highway Fund and is therefore an eligible use of Highway Funds.

I. Factual Background

The 2020 wildfire season was one of the state's most destructive on record.² The largest block of fire, referred to as the Oregon Labor Day Wildfires, consisted of five fires on the western side of the Cascades that spread dramatically due to a historic windstorm. These fires took the lives of nine Oregonians³, displaced thousands of individuals⁴, burned more than 1.2 million acres of land⁵, and destroyed more than 5,000 residential and commercial structures.⁶ In the wake of the 2020 wildfire season, Oregon has begun rehabilitation efforts, including cleaning up debris and hazardous materials.

To reach Oregon's wildfire recovery goals, the state has assigned the Oregon Department of Transportation to lead the Oregon Debris Management Task Force. The task force also consists of the Office of Emergency Management (OEM) and the Department of Environmental Quality (DEQ). Oregon's wildfire debris clean-up process consists of two steps focusing on the safe clean-up and disposal of potentially harmful materials.⁷ In December 2020, ODOT completed step one, which addressed the clean-up of household hazardous waste removal. Step two, which consists of removing hazard trees, ash, and debris by state-hired contractors⁸, began in December 2020 and is predicted to take six to eighteen months to complete. Hazard tree removal clears trees that can fall onto roadways, properties, and recreation areas where people frequent. Similarly, ash and debris removal consist of toxic ash and structural debris which must be removed to ensure safety before rebuilding can begin.⁹

Currently, the total cost estimate of the debris clean-up is \$622 million.¹⁰ The assessment includes \$326 million for ash and debris removal and \$295.7 million for hazard tree removal.¹¹

² WWW.OREGON.GOV, <https://www.oregon.gov/odf/fire/Pages/investigations.aspx> (last visited June 11, 2021).

³ Exec. Summary, Recovering & Rebuilding from Oregon's 2020 Wildfires: Key Findings & Recommendations (January 2021), <https://www.oregon.gov/gov/policy/Documents/WERC-2020/Wildfire%20Report%20FINAL.pdf>.

⁴ *Id.* at 3.

⁵ *Id.* at 3.

⁶ *Id.* at 4.

⁷ *Id.* at 18.

⁸ *Id.*

⁹ *Id.*

¹⁰ WWW.OREGON.GOV, https://www.oregon.gov/gov/policy/Documents/WERC-2020/Funding%20Briefing%20Document_v4.pdf, (last visited June 11, 2021).

¹¹ *Id.*

Oregon and the Federal Emergency Management Agency (FEMA) will share the cost to fund the clean-up efforts.¹² While Oregon funds will initially pay for clean-up, at least 75% of the hazard tree removal and structural debris removal is eligible for reimbursement by FEMA as long as the Oregon Debris Management Task Force complies with FEMA's requirements of controlling costs, reducing waste, and eliminating fraud.¹³

As the Oregon Debris Management Task Force and specifically ODOT and its contractors began implementing their plans to cut nearly 300,000 trees deemed as hazardous, members of the public grew concerned about the number of trees being cut along scenic highways, protected rivers, and secondary roads within the burn boundaries of 2020's wildfires. Following Oregon Public Broadcasting's exposé of ODOT's mismanagement of post-fire roadside hazard tree removal and accusations by whistleblowers and industry leaders, Oregon Senator Jeff Golden, chair of the Senate Wildfire Recovery Committee, held several hearings requesting information from ODOT regarding the tree removal effort. It was during this time that Cascadia submitted its public records request. Since the hearings, public officials, environmental groups, and communities affected by the post-fire logging have called upon Governor Kate Brown to immediately pause the cutting and halt the excessive roadside logging occurring under the guise of hazard tree removal.

On April 1, 2021, Cascadia submitted its public records request to ODOT. See Exhibit 1. Cascadia requested, inter alia, records pertaining to hazard tree removal following the fall 2020 wildfires, including:

- 1) All Documents outlining, guiding, or pertaining to the removal of hazard trees following the wildfires beginning in September 2020;
- 2) All documents pertaining to criteria for hazard tree removal and assessment;
- 3) All documents calculating or estimating road mileages and acreages of hazard tree assessment and removal in post-wildfire roadside areas;
- 4) All documents pertaining to hazard tree removal and assessment for the Riverside, Beachie, Holiday Farm, Two-Four, and Archie Thielsen fires from 2020
- 5) All documents relating to FEMA correspondence relating to the 2020 wildfires;
- 6) All documents in connection with contractors involved in hazard tree removal.

In the request, Cascadia explained its general background and mission as a public interest non-profit organization with a strong interest in post-fire logging and the management of public forests. Ex. 1 at 2. Cascadia described its intent to use the information requested to more fully understand ODOT's decision-making process and its intent to share the information with the public and policy decision-makers, including interested state and federal politicians. It also described the public interest served by the disclosure of the requested records. Cascadia explained that it does not have the resources to pay a substantial amount, if any, for the information but also that it had no commercial interest in the information. Id.

¹² See [WWW.OREGON.GOV](https://www.oregon.gov/gov/policy/Documents/WERC-2020/Funding%20Briefing%20Document_v4.pdf), https://www.oregon.gov/gov/policy/Documents/WERC-2020/Funding%20Briefing%20Document_v4.pdf, (last visited June 11, 2021). (Explaining how ODOT is permitted to use State Highway Fund resources to remove hazard trees; however, eliminating structural debris does not fall within the purview of the State Highway Fund under the Oregon constitution. Therefore, for the removal of structural debris, the state will cover costs using the state's General Fund.)

¹³ [WILDFIRE.OREGON.GOV](https://wildfire.oregon.gov/clean-up), <https://wildfire.oregon.gov/clean-up>, (last visited June 11, 2021).

On Friday, April 9, 2021, Nick Cady from Cascadia received an email from Lauri Kunze, Rules and Public Records Team Lead, ODOT. Exhibit 2. The email included an attached estimate of \$87,756.60 to fulfill the request. Exhibit 3. The email also denied the fee waiver “due to the volume of records requested and the number of staff hours and materials required to produce them.” Exhibit 2.

Mr. Cady responded to the email on May 27, 2021, asking if there was a reason fulfilling the request would require such a high number of hours for only 2000 pages of documents. Exhibit 4. Ms. Kunze responded on June 1, 2021 but provided no additional reasons for the high number of hours included in the costs estimate. Exhibit 5. She noted that Mr. Cady could be in touch with Frank Reading or Joe Squire of ODOT to discuss altering the scope of the request. Mr. Cady responded that he would appreciate touching base with Mr. Reading and Mr. Squire (copied on the email) and requested a meeting. Exhibit 6. On Friday, June 4, 2021, Mr. Cady had a phone conversation with Mr. Reading and Mr. Squire. In that conversation, Mr. Cady asked if there was any aspect of the request that was resulting in extensive review time or resulting in a large volume of records, and asked if the request could be altered in any way that would reduce costs and/or production time. Mr. Reading and Mr. Squire had no concrete suggestions and maintained that the initial cost estimate was reasonable. Cascadia was left with no choice but to file this request for an order regarding the public records.

II. Legal Background

Under Oregon’s Public Records Law, “every person”¹⁴ has a right to inspect any nonexempt public record of a public body¹⁵ in Oregon.¹⁶ A public body is authorized to establish fees “reasonably calculated to reimburse [it for the] actual cost of making public records available.”¹⁷ The public body calculates fees to reimburse for its “actual costs” in “summarizing, compiling or tailoring the public records, either in organization or media, to meet the person’s request.”¹⁸ When a fee estimate exceeds twenty-five dollars, a public body must provide a written estimate to the records requester. Additionally, the public body must demonstrate to the requester how it calculated its fees for the public records request.¹⁹ Further, the public body should notify the requester regarding the hourly charge for different categories of staff work and the cost to copy records.²⁰ To help requesters avoid excessive fees and save public bodies valuable time, officials working for the public bodies may steer requesters to use narrower search terms or a narrower date range and limit searches to the most relevant employees of the public body.

¹⁴ See OR. REV. STAT § 192.311(3) (2020) (defining “Every person” to include “any natural person, any corporation, partnership, firm or association, and any member or committee of the Legislative Assembly.”)

¹⁵ See OR. REV. STAT § 192.324(6) (2020) (defining a “public body” to include “every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state.”)

¹⁶ OR. REV. STAT § 192.314(1) (2020)

¹⁷ OR. REV. STAT § 192.324(4) (a) (2020)

¹⁸ OR. REV. STAT § 192.324(4)(a) (2020)

¹⁹ OR. REV. STAT § 192.324(4) (c) (2020)

²⁰ See *Davis v. Walker*, 814 P.2d 547-550 (Or. App. 1991) at 131–33 & n 5 (fees charged by city police bureau were not reasonably calculated to reimburse bureau for its actual costs where bureau offered no specific support for its charges for staff time).

Public bodies are statutorily required to consider and grant reasonable requests to waive or reduce fees associated with fulfilling a public record request if doing so is in the public's interest "because making the records available primarily benefits the general public."²¹ A public body's fee waiver decision considers the character of the public interest in the particular disclosure, the extent to which the fee impedes that public interest, and the extent to which a waiver would burden the public body.²² A requester who believes that a public body has unreasonably denied their fee waiver may contest the public body's denial by submitting a petition to the Attorney General to review.²³ In reviewing a public body's denial of a fee waiver, the Attorney General looks at three factors: (1) whether the public body's decision was "unreasonable," (2) whether the requester meets the "public interest" test, and (3) whether a fee waiver is prohibited by law.²⁴

III. ODOT's Unreasonable Fee Estimate is an Improper Constructive Denial of Cascadia's Public Records Request

Under ORS 192.440(3), a public body "may establish fees reasonably calculated to reimburse it for its actual cost in making such records available, including costs for summarizing, compiling, or tailoring such record, either in organization or media, to meet the person's request."²⁵ The law places the burden on a public body to show that assessed fees are reasonably related to the actual costs of responding to an information request.²⁶ ODOT has not met its burden of showing that the fees it has assessed are related to its production of documents requested by Cascadia. Moreover, ODOT's excessive public record request fee of \$87,756.60 compared to the nature of Cascadia's request suggests that the true purpose of ODOT's fee is to constructively deny Cascadia's request rather than recoup ODOT's actual costs.²⁷

A public body must provide a written estimate to a requester, as well as an explanation on how they calculated their proposed fee by demonstrating "that their fee schedules are based upon their actual costs in making public records available for inspection or copying."²⁸ In *Davis v. Walker*, the Oregon Court of Appeals held that the trial court erred in upholding fees as reasonable when a public body had not carried its burden to show that fees are reasonably calculated to reimburse for its actual costs.²⁹ The court concluded that for fees to be reasonable, 1) the fees must be authorized by ordinance, and 2) a public body must carry its burden to show that the fees are reasonably calculated to reimburse them for their actual costs.³⁰ The fees in the *Davis* case were authorized by ordinance,³¹ but the public body offered no specific support or reasoning for how it calculated the fee. Similarly here, ODOT has provided authorized by ordinance fees, but ODOT has not offered any particular support or sense for its excessively high figures.

²¹ OR. REV. STAT § 192.324(4) (2020)

²² Public Records Order, Sept 10, 2009, Rogers, at 3

²³ OR. REV. STAT § 192.324(6) (2020)

²⁴ See Oregon Attorney General's Public Records and Meetings Manual ("Manual") at 24 (2019), https://www.doj.state.or.us/wp-content/uploads/2019/07/public_records_and_meetings_manual.pdf.

²⁵ OR. REV. STAT § 192.324(3) (2020)

²⁶ OR. REV. STAT § 192.411(1)

²⁷ See Public Records Order, Mar 23, 2009, Kellington, at 4. (A long delay in receiving a fee estimate, is not independently sufficient to show a constructive denial of a request for public records.)

²⁸ *Davis v. Walker*, *supra* note 21, at 549

²⁹ *Id*

³⁰ *Id.*

³¹ *Id.*

In addition to ODOT failing to meet its burden of showing that the fees it has assessed are related to its production of documents, ODOT's \$87,756.60 fee is a constructive denial of the public information request. A constructive denial occurs when a public body requests public record fees that are excessive compared to the nature of the request. In such circumstances, to enforce the inspection provisions of the Public Records Law, the Attorney General can evaluate a public body's fees and hold public bodies accountable.³² ODOT's excessive fee and denial of a fee waiver prevents disclosure and constructively denies the public from accessing information about the functioning of the Oregon government.³³

The magnitude of ODOT's fee and the excessive amount of hours that ODOT has predicted is disproportionate to the amount of pages ODOT anticipates would be included in the public records request. Upon reviewing Cascadia's public records request, ODOT calculated the excessive fee of 87,756.60 dollars for around 2,000 pages in documents. ODOT also estimated that approximately 105 employees would have to be involved in pulling together and processing the records Cascadia requested. Further, ODOT calculated that to complete Cascadia's request as written, it needed 1,343 employee hours plus ten hours of the Department of Justice's time.

ODOT has entirely failed to explain its excessively high figures and has instead grossly overestimated the amount of time and employees needed to fulfill Cascadia's public record request. See Ex. 5 (providing no response or reasoning for the magnitude of the estimate). The outlandish fee of \$87,756.60 and the inability of the ODOT public records officer to explain it demonstrates ODOT's intent to use the excessive fee to constructively deny the request rather than recoup ODOT's actual costs. The public cannot be expected to just "trust" that such an exorbitant fee is the actual cost or even a reasonable estimate with no further explanation.

IV. ODOT Improperly Denied Cascadia's Request for a Fee Waiver Because the Request Meets the Public Interest Test

In addition to charging an excessive and unreasonable fee, ODOT improperly denied Cascadia's fee waiver because furnishing the public records that Cascadia requested would primarily benefit the general public. Additionally, ODOT's decision to deny a request for a fee waiver or reduction is not reasonable under the totality of the circumstances.³⁴ Oregon's Public Records Law permits public bodies to waive or reduce fees if a waiver is primarily in the public interest.³⁵ Waiving or reducing fees is considered in the public interest "when the furnishing of the record has utility—indeed, its greatest utility—to the community or society as a whole."³⁶

To ensure standardized criteria for evaluating whether a request for a fee reduction or waiver is in the public interest, public bodies can use the Public Interest Threshold Evaluation.³⁷ The Public Interest Threshold Evaluation considers multiple factors that aid in determining whether there is sufficient public interest to be derived from disclosure to warrant the granting of

³² *Id.*

³³ E.g., Public Records Order, Mar 23, 2009, Kellington, at 4.

³⁴ *Id.*

³⁵ OR. REV. STAT § 192.324 (2020)

³⁶ See *In Defense of Animals v. OHSU*, 199 Or App. 160,173-190 (2005) (explaining that the statutory standard for fee waivers and reductions requires that a waiver or reduction be "in the public interest." A matter or action is commonly understood to be "in the public interest" when it affects the community or society as a whole, in contrast to a concern or interest of a private individual or entity.)

³⁷ Department of Administrative Services: Public Interest Threshold Evaluation Form, <https://www.oregon.gov/das/Docs/03-PITC-EvaluationForm.pdf> (last visited June 16, 2021).

a fee waiver.³⁸ The test balances three main criteria a) Public Interest, b) Private or Commercial Interests, and c) Reasonableness. Each criterion includes its own set of questions.³⁹

While a public body may decide that waiving or reducing a fee is in the public interest, the public body ultimately has the discretion to waive the fee.⁴⁰ The public body's decision, on a case-by-case basis, must be reasonable under the totality of the circumstances.⁴¹ If a requester receives a denial of a public interest fee waiver, a requester can contest a public body's decision not to waive or reduce fees by submitting a petition to the Attorney General.⁴² Upon review, the reviewing body reassesses the totality of the circumstances to determine whether a public body's decision exceeds the lawful options available to it under the Public Records Law.⁴³ Thus, although a public body enjoys discretion concerning whether to grant or deny fee waivers and reductions, that discretion is not unlimited. ODOT should accept Cascadia's request for a fee waiver because the Public Interest Threshold Evaluation disclosure of ODOT's records is in the public interest. Additionally, upon review, the Attorney General will find that ODOT's decision to deny a request for a fee waiver or reduction is not reasonable under the totality of the circumstances.⁴⁴

a) Public Interest

In considering whether a public records request is in the public's interest, the "Public Interest" prong of the Public Interest Threshold Evaluation provides three questions, the answers to which aid in balancing the public interest in disclosure against the public body's interest in confidentiality. The questions inquire into the requester's ability to disseminate the requested information and the impacts that disclosure of the requested information will have on the general public. Under the first two questions of the "Public Interest" criteria, disclosing the information that Cascadia requested would directly serve an identified interest of the general public and advance the welfare or well-being of the general public.

In *American Civil Liberties Union of Oregon, Inc. v. City of Eugene*, a civil liberties organization filed suit against the city of Eugene for failing to disclose records relating to civilian review board's review of an investigation of alleged police misconduct in a high-profile arrest of, and use of a stun gun on, a protester.⁴⁵ The court identified the public's interest in government transparency and stressed the role such openness can have in obtaining mutual trust between the public and government employees.⁴⁶

³⁸*Id.*

³⁹ *Id.*

⁴⁰ *In Defense of Animals v. OHSU*, *supra* note 36, at 173

⁴¹ *Id.*

⁴² See Oregon Attorney General's Public Records and Meetings Manual ("Manual") at 24 (2019), https://www.doj.state.or.us/wp-content/uploads/2019/07/public_records_and_meetings_manual.pdf. ("If a public body fails to comply with the 15 business-day deadline or complete its response as soon as practicable and without unreasonable delay, the requester can petition the Attorney General (for state agencies) or the appropriate district attorney (for other public bodies) to order the disclosure of any nonexempt records; or file suit against the public body in circuit court (for elected officials).")

⁴³ See Oregon Attorney General's Public Records and Meetings Manual ("Manual") at 24 (2019), https://www.doj.state.or.us/wp-content/uploads/2019/07/public_records_and_meetings_manual.pdf. ("Even if waiving or reducing the fee is in the public interest, a public body has the discretion whether to do so. However, the public body's decision, on a case-by-case basis, must be reasonable under the totality of the circumstances.")

⁴⁴ *Id.*

⁴⁵ *Am. Civ. Liberties Union of Oregon, Inc. v. City of Eugene*, 380 P.3d 281, 301 (Or. 2016).

⁴⁶ *Id.* at 299.

To promote the necessary mutual trust, the court explained that police practices, complaints, and procedures, must be transparent and open to public inspection.⁴⁷ The court reasoned, “it is important for the public to know when the police overstep; it is important for the public to know when they do not. And it is important that the basis for differing results be known and understood.”⁴⁸ The court's decision advanced the welfare of the general public by reflecting its preference for a policy of governmental openness, holding that the public interest in transparency requires disclosure of the requested documents.⁴⁹

In *ACLU*, the court underlined how transparency advanced the welfare of the general public by leading to mutual trust. The court expressed that the police cannot do their work effectively without mutual trust, and the public cannot feel safe.⁵⁰ Here, we are dealing with an issue of utmost importance for public safety and transparency, and thus ODOT should have accepted Cascadia's fee waiver. \$600 million of taxpayer dollars are being used to address the worst wildfire seasons in Oregon's recent history. ODOT has awarded extremely large contracts to private contractors, including several that are not from Oregon and have no experience with wildfire recovery. There was no public environmental review process for the activities ODOT is conducting, nor has ODOT made available any environmental analysis that it undertook before beginning the work. For comparison, California has extensive documentation of its post-fire work available online, including funding information, budget reports, environmental review and contracts.⁵¹ Even the Oregon Health Authority's COVID-19 website has substantial in-depth information available to the public. Oregon's debris removal website, by contrast, is virtually devoid of information and detail.

ODOT's excessive fee of \$87,756.60 and lack of transparency does not promote mutual trust or a policy of governmental openness in Oregon, particularly around such major activities affecting public roads and lands. Oregon's public is interested in ensuring state agencies are following the law, especially as it pertains to the treatment of some of the most treasured natural areas in the state. It is in the public's best interest to have access to the information necessary to understand how ODOT is making post-fire logging decisions, how public dollars are being spent, and whether or not these decisions are illegal. Transparency around ODOT's recent decisions will enhance the general public's welfare and help establish mutual trust for future work on wildfires and other public safety concerns.

Under the last question of the “Public Interest” criteria of the Public Interest Threshold Evaluation, Cascadia can actually and meaningfully disseminate the requested information. Conservation groups, state and federal politicians, and the media have requested ODOT's records. Cascadia is in regular contact with these persons and entities and will immediately transmit all information provided to these parties. Cascadia will use its extensive network of members, supporters, and the general public to disseminate the information through various letters to the editors, opinion articles, and press releases. The disclosure of ODOT's records would directly serve Oregon's citizens searching for clarity surrounding the allegations of mismanagement of Oregon's forest after the 2020 wildfires. An \$87,756.60 fee prevents the public from accessing valuable information and prevents the public from holding their representatives accountable for environmental law violations and the mismanagement of Oregon's public forests.

⁴⁷ *Id.* at 298.

⁴⁸ *Id.* at 298.

⁴⁹ *Id.* at 297.

⁵⁰ *Id.* at 298.

⁵¹ *See e.g.* <https://www.hcd.ca.gov/community-development/disaster-recovery-programs/ndrc.shtml>.

b) Private or Commercial Interest

In considering whether a public records request is in the public's interest, the “Private or Commercial Interest” prong serves to specify whether the requested information will primarily benefit an individual or the greater public. Here, the documents are not for Cascadia’s benefit. Rather, Cascadia will disseminate the information to the general public and public officials.⁵²

The records requested by Cascadia are in high demand across the state of Oregon and beyond. Public interest organizations and the media, including Oregon Public Broadcasting, Sierra Club, Oregon Wild, Oregon League of Conservation Voters, Cascadia Forest Defenders, among other groups, have written statements in opposition of ODOT's current mismanagement as well as messages urging Governor Kate Brown to suspend the state's tree removal operation and order an investigation on ODOT. Cascadia requested records will greatly benefit Oregonians allowing them to ask informed questions. Ultimately if the information leads to the findings that ODOT's process is flawed, Oregonians will be able to use the information gathered to reform post-fire logging practices by ODOT and make sure the public body is adhering to the law. ODOT's inaccessible records have the potential to save some of Oregon's most scenic corridors and treasured places.

c) Reasonableness

In considering whether a public records request is in the public's interest, the “Reasonableness” prong serves to specify whether the public body has the resources and time to grant a waiver or reduce fees without causing an unreasonable burden on public body resources.⁵³ Additionally, this prong serves to identify whether the requester provided a narrowly tailored public records request.⁵⁴ If waiving or reducing fees associated with fulfilling a public record request is in the public interest, public bodies are statutorily required to consider and grant reasonable requests.⁵⁵ A reviewing body cannot wholly address the specifications listed above until ODOT has met its burden, addressed in Section III, showing that the fees it has assessed are related to its production of documents requested by Cascadia.

ODOT has not carried its burden of showing that it reasonably calculated its public request fee to reimburse ODOT for its actual costs. As mentioned in Section III, the court in *Davis* held that for fees to be upheld as reasonable: 1) fees must be authorized by ordinance, and 2) a public body must provide specific support for the public record request fee amount.⁵⁶ While ODOT’s fee is authorized by ordinance, ODOT failed to provide essential context and explain how they reasonably calculated their fee to reimburse them for their actual costs.

Additionally, Cascadia’s public records request is not overly broad. The timeframe is, in fact, limited to only one wildfire season. has not carried its burden of showing that it reasonably calculated its fee to reimburse its actual costs.⁵⁷ In an email from Lauri Kunze, the Rules and Public

⁵² A requester arguing that their tax situation serves an identified interest of the general public does not qualify for a public interest fee waiver. *Cf. Conklin v. United States*, 654 F Supp 1104, 1106 (D. Colo 1987) (holding that the plaintiff's fee waiver request relating to the plaintiff's tax situation does not directly serve an identified interest of the general public and advance the welfare or well-being of the general public).

⁵³ Department of Administrative Services: Public Interest Threshold Evaluation Form, <https://www.oregon.gov/das/Docs/03-PITC-EvaluationForm.pdf> (last visited June 16, 2021).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Davis* at 549.

⁵⁷ *Id.*

Records Team Lead, Mrs. Kunze suggested that Cascadia consider reducing the scope of the request.⁵⁸ She explained that if Cascadia reduced its scope, ODOT would be happy to revisit the amount of the estimated fee and reconsider your request for a waiver.⁵⁹ Cascadia's reply which inquired into how the organization could more narrowly tailor their request was met with deflection and avoidance.⁶⁰ Ultimately, ODOT was unwilling to offer any recommendations regarding how Cascadia could more narrowly tailor its request.⁶¹

Cascadia cannot pay ODOT's fee of \$87,756.60. ODOT's disproportionate fee precludes the public from vital information about the happenings along some of Oregon's most scenic corridors and treasured places. As a public interest, non-profit organization, Cascadia does not have the resources to produce such a substantial amount, if any, for this information. Furthermore, with the growing concerns over wildfires, ODOT's hefty fee silences public officials, environmental activists, communities affected by the post-fire logging, and the general public from using their voices to help shape Oregon's sustainable forest policies and practices for hazard tree removal.

V. ODOT's Reliance on the Highway Fund Limitations as a Justification for Waiver Denial is Misplaced

In ODOT's decision to deny Cascadia a fee waiver, ODOT relies on its fiduciary obligation not to use constitutionally dedicated Highway Trust Funds in a manner outside of its dedicated purposes. However, ODOT's compliance with Cascadia's public records request is not an illegal diversion of the constitutionally dedicated Highway Funds. It is not unlawful for ODOT to use the Highway Funds because 1) ODOT's hazard tree removal is a highway-related project, and 2) ODOT is permitted to expend constitutionally dedicated money to comply with a fee waiver or reduction if a particular request would benefit the administration.⁶²

The "Highway Fund" refers to sums of money derived from taxes and fees on motor vehicles and motor vehicle fuels.⁶³ In *Rogers v. Lane County*, the Oregon Supreme Court narrowly construed article IX, section 3a of the Oregon Constitution.⁶⁴ The Court concluded that constructing an airport parking lot and a covered walkway from the parking lot to the airport itself was not a highway-related project and, therefore, not a constitutionally permissible use of Highway Funds.⁶⁵ The *Rogers* court held that ODOT must limit the expenditure of Highway Funds exclusively to spending on highways, roads, streets, and roadside rest areas themselves or for other projects or purposes "that primarily and directly facilitate motorized vehicle travel."⁶⁶ Unlike the *Rogers* case, ODOT's removal of thousands of hazard trees burned in last year's wildfires is a highway-related project that serves a constitutionally permissible use of Highway Funds.⁶⁷

⁵⁸ Exhibit 2.

⁵⁹ *Id.*

⁶⁰ Exhibit 5.

⁶¹ *Id.*

⁶² Or. Const. Article IX, sec 3a

⁶³ WWW.OREGON.GOV, [https://www.oregon.gov/odot/About/Pages/Transportation-Funding.aspx#:~:text=Oregon's%20State%20Highway%20Fund%20collects,and%20vehicle%20title%20and%20registration.\(last visited June 11, 2021\).](https://www.oregon.gov/odot/About/Pages/Transportation-Funding.aspx#:~:text=Oregon's%20State%20Highway%20Fund%20collects,and%20vehicle%20title%20and%20registration.(last%20visited%20June%2011,%202021).)

⁶⁴ *Rogers v. Lane County*, 771 P.2d 254 (Or. 1989)

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

In 2016 a petition for a public record fee waiver from Kevin Harden was reviewed by Attorney General Rosenblum.⁶⁸ ODOT denied the initial fee waiver request based on the same fiduciary obligation given to Cascadia: that ODOT has the responsibility not to use constitutionally dedicated Highway Trust Funds in a manner outside of its dedicated purposes. ODOT had interpreted this mandate based on prior public records orders prohibiting it from spending Highway Fund revenue to fulfill public records requests.⁶⁹ Attorney General Rosenblum's response to Kevin Harden suggests that the interpretation of statutory and constitutionally dedicated funds has since changed and that Highway Fund revenue can fulfill public records requests.⁷⁰

Attorney General Rosenblum referred to a recent order, the *Friedman* order, in which she concluded, that PERS was not prohibited from waiving public records fees despite being mandated to act only for the exclusive benefit of PERS members and beneficiaries.⁷¹ Instead, PERS was permitted to expend statutorily dedicated Public Employees Retirement Fund (PERF) money to comply with the fee waiver and reduction provisions of the Oregon Public Records Law.⁷² It was further noted that transparency in public administration can be beneficial to government programs by discouraging misuse of funds and other misconduct.⁷³ In deciding whether to waive or reduce fees, PERS could consider the extent to which a particular request might benefit the administration of PERF. Although Kevin Hardin's fee waiver was denied based on its facts, Attorney General Rosenblum applied the same interpretation and principles for PERS to ODOT.

In the *Friedman* order, *PERS* had the authority to waive or reduce fees if a particular request would provide administrative benefit to its members and the administration.⁷⁴ Therefore PERS was permitted to expend statutorily dedicated funds toward public record requests. Similarly, ODOT is authorized to use state highway funds to pay administrative expenses that ODOT incurs and is permitted to expend constitutionally dedicated funds, like the Highway Fund, for public record requests if the request provides administrative benefit to its constituents and benefit to the administration.

ODOT should consider the extent to which Cascadia's public record request may benefit them and ultimately waive the excessive public record fee. FEMA could deny federal disaster reimbursement and leave Oregon taxpayers or the government to pay for hazard tree removal if ODOT unlawfully performs its hazard tree removal and ODOT contractors' activities are deemed fraudulent. By waiving (or at a minimum, substantially reducing) Cascadia's public record request fee, which ODOT can lawfully do using the Highway Funds, the public has the opportunity to discover if ODOT's hazard tree removal is flawed. Additionally, the public can use the information gathered to reform post-fire logging practices by ODOT and bring them into compliance with existing laws.

VI. Conclusion

For all of the above reasons, Cascadia respectfully requests an order that ODOT's fee estimate was unreasonable and unjustified and wrongly resulted in a constructive denial of the request.

⁶⁸ Public Records Order, Oct 18, 2016, Harden, 1-4.

⁶⁹ *Id.* at 1.

⁷⁰ *Id.*

⁷¹ Public Records Order, Sept 12, 2016, Friedman, 1-6, at 1.

⁷² *Id.* at 4

⁷³ Public Records Order, Oct 18, 2016, Harden, at 3.

⁷⁴ Public Records Order, Sept 12, 2016, Friedman, at 5-6.

Cascadia further requests that the Attorney General find that Cascadia's request is in the public interest and reverse ODOT's denial of Cascadia's fee waiver request. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Meriel L. Darzen', with a long horizontal stroke extending to the right.

Meriel L. Darzen
Attorney for Cascadia Wildlands

Encl. Exhibits 1 through 6.