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Western Environmental Law Center

Defending the West Wildlands, Water, and Western Communities

July 17, 2006

Jens Schmidt
Harrang Long Gary Rudnick PC
360 East 10th. Ave., Suite 300
Eugene, OR 97401-3248

DELIVERY BY FAX TRANSMISSION AND EMAIL ATTACHMENT

Re: *In Defense of Animals v. Oregon Health Sciences University*, (Multnomah County Circuit Court No. 0107-07401); OHSU settlement proposal.

Dear Jens:

I am gratified that in your recent letter, OHSU is offering to settle this case by providing paper copies of the primate health records and a full waiver of associated fees. Although they are not rejecting this offer at this time, my client has asked that I investigate further the possibility of having the data produced in an electronic format such as PDF files in an appropriate electronic medium; e.g., DVD or CD disks or some other removable storage device.

As you know, IDA has not requested that the primate health data at issue in this case be disclosed in electronic format as an end in itself. Rather, we have consistently suggested this option as a means to reduce the costs OHSU asserts it will necessarily incur in order to release the requested information. As I have noted to you in prior correspondence, your January 30, 2006 letter establishing OHSU's fee determination of \$25,932.40, asserted that almost \$22,000 of this amount pertains solely to work required only because OHSU insists on releasing the data on paper instead of in electronic format.

OHSU has stated that its refusal of IDA's suggestions that the data be released in electronic format is based on a concern that such disclosure would require "reprogramming" OHSU's computers to electronically delete exempt data rather than making the redactions manually after paper copies had been printed. You do not interpret the Oregon Public Records Act to require such "reprogramming." Accordingly, you have suggested that OHSU is rejecting IDA's proposals so that it will not establish a precedent that it be required to engage in such "reprogramming" in response to future public records requests.

As I have suggested previously, it is my analysis that the nature and scope of the database manipulation implicated in the electronic disclosure of the primate health records does not constitute "reprogramming" and that the Court would so agree. However, in the interest of fostering settlement of this matter, IDA is prepared to stipulate as part of a settlement agreement that the case will not establish a precedent regarding the issue of whether OHSU is required to "reprogram" its computers in response to public records requests.

As you recall, when it rejected OHSU's earlier fee assessments in this case, the Oregon Court of

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Appeals held that an agency may properly assess fees under the Oregon Public Records Act only to the extent that they are "reasonably" incurred. *IDA v. OHSU*, 199 Or.App. 160, 185-86 (2005).

In this regard, when we deposed OHSU's computer applications manager [REDACTED], he testified that he was "confident" that it would take no more than 40 hours of his time to produce a "cleansed version" of the primate history database. [REDACTED] Depo. transcript at 72-73. By that, he was referring to producing an electronic version of the primate health database that excluded data exempt from disclosure by "programming" the database. *Id.* Based on information you have disclosed in response to our discovery requests that indicates that [REDACTED] hourly rate is \$31.32 and that his benefits currently average an additional 27.30%,¹ we can calculate that it would cost OHSU approximately \$1,594.80 to produce an electronically redacted "cleansed version" of the animal history database:

$$40\text{hr.} \times \$31.32 = \$1,252.80 + (\$1,252.80 \times 27.30\% = \$342) = \$1,594.80.$$

This amount is in sharp contrast to the almost \$6,000 you project it will cost if OHSU relies upon manual redaction of the exempt information. *See*, your letter to me, dated January 30, 2006 at 2.

The only additional time/expense that [REDACTED] could identify was associated with the subsequent generation of the animal histories themselves from the "cleansed" database. [REDACTED] Depo. transcript at 73-74. [REDACTED] did not disagree with the cost figure of \$500 that I suggested for this step of the process.² *Id.* Consequently, it would cost approximately \$2,100 for OHSU to produce an electronically "cleansed version" of the primate health database and generate the relevant animal histories; \$1,594.80 + \$500 = \$2,094.80

The record of this case suggests that there is no reason that if OHSU can print paper copies of the primate health reports, it cannot similarly generate PDF versions.³ These electronic files could then easily be placed on DVD or CD disks (or other form of removable electronic storage medium) for inexpensive transferal to IDA. This would obviously eliminate the \$16,000 you estimate it would cost to produce paper copies of the requested data.

Based on the calculations above, it appears that OHSU is capable of producing the data at issue in this case in electronic format for the additional expenditure of only \$2,100. However, OHSU is suggesting that it must incur an additional \$22,500⁴ to produce the same information in paper format. Under the Court of Appeals' holding in this case, *IDA v. OHSU*, 199 Or.App. at 185-86, the more than \$20,000 differential between these figures is simply not a "reasonable" cost and cannot be supported under the Oregon Public Records Act.

Since early in this litigation, IDA has maintained that OHSU's extreme, putatively "necessary" costs to respond to this document request are not supported by the law or the facts of this case. That OHSU's settlement offer now contemplates that taxpayers or OHSU's donors shoulder these costs does not render the generation of approximately \$22,000 in apparently unnecessary expenses any more "reasonable" than when OHSU was insisting that IDA pay. I most recently raised this point in an email to you dated June, 22, 2006. It is your silence regarding this issue in your

¹ *See* January 10, 2006 email exchange between [REDACTED] and [REDACTED] Bates No. 0010.

² This number is based on your representation that it would cost \$514.38 "to produce the animal histories" from the database. *See*, your letter of January 30, 2006 at 2.

³ You will recall that when we deposed [REDACTED], he indicated that the primate health data reports could be printed as PDF files instead of as paper copies. [REDACTED] Depo. transcript at 63-65.

⁴ \$500 for generating the primate history reports from "uncleansed" database + \$6,000 for manual redaction of exempt information + \$16,000 for copying costs = \$22,500.

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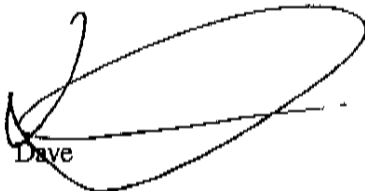
subsequent settlement letter that provides the basis for this renewed inquiry.

Finally, I ask that you estimate when OHSU envisions that the production of the primate histories would occur and how the documents produced would be organized. In regard to the latter, IDA has suggested to me that chronological organization by individual animal would be preferred. In order to eliminate any confusion related to precisely what would be produced consequent to settlement, I suggest that OHSU produce a "trial run" of representative primate histories — much as it produced "screen shot" copies of such histories in December, 2001 — for IDA's review prior to finalization of any settlement agreement.

I believe that our stipulation offer eliminates any concern OHSU could reasonably entertain regarding any "precedents" possibly occasioned by settlement of this case. Accordingly, I do not perceive that issue to impose a barrier to resolution of this matter. Moreover, as noted above, it appears that if this case is litigated on its merits, OHSU will find neither legal nor factual support for its insistence that it expend \$22,500 in additional costs to produce the requested data in paper when its own evidence demonstrates that it could do so for approximately \$2,100 in electronic format.

I look forward to receiving OHSU's response to this letter at your earliest convenience.

Sincerely,



Dave

cc. Client