

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF COOS

THE OREGON INTERNATIONAL PORT OF)	
COOS BAY, an Oregon Municipal)	Case No. 12CV0161
Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
SIERRA CLUB, a California non-profit)	
)	
Defendant.)	

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on regularly for hearing before the Honorable Paula M. Bechtold, Judge of the Circuit Court of the County of Coos, State of Oregon, commencing at the hour of 11:03 a.m. on Friday, January 25, 2013.

APPEARANCES

Mr. Michael R. Stebbins
Attorneys at Law
Appearing on behalf of the Plaintiff;

Ms. Jessica Yarnall Loarie
Mr. Duane A. Bosworth
Mr. David A. Bahr
Attorneys at Law
Appearing telephonically on behalf
of the Defendant.

1 P R O C E E D I N G S

2 THE COURT: Hello. Can you hear me?

3 MS. YARNALL LOARIE: Yes, Judge.

4 MR. BAHR: Yes, Your Honor.

5 THE COURT: All right. So we are in the
6 courtroom in the matter of the Oregon International Port
7 of Coos Bay versus Sierra Club, Case No. 12CV0161. And
8 present in the courtroom representing the Port is
9 attorney Mike Stebbins.

10 And who is on the phone?

11 MR. BAHR: David Bahr with Sierra Club,
12 Your Honor.

13 MS. YARNALL LOARIE: Jessica
14 Yarnall Loarie for the Sierra Club.

15 THE COURT: Anybody else?

16 MR. BOSWORTH: And Duane Bosworth.

17 MR. BAHR: Yes. Yes, Your Honor, Duane
18 Bosworth is here also.

19 THE COURT: All right. Duane Bosworth
20 also representing the Sierra Club; is that correct?

21 MR. BOSWORTH: That's correct.

22 THE COURT: All right. And this is the
23 time set for the Court's oral decision on the parties'
24 dueling motions for summary judgment.

25 First of all, apologies to all involved.

1 Had I had more time, this opinion would be tighter, more
2 polished and presumably, hopefully, more articulate.
3 Second and third readings, subsequent editings do make a
4 significant difference in the quality of an opinion.
5 But being mindful of the trial date next week, it was
6 imperative to hurry this along and that also meant it
7 had to be worked into and around my busy trial docket.

8 And I do not have the luxury of a law
9 clerk, so again, apologies for what will probably be a
10 bit disjointed in my opinion.

11 Secondly, disclosures. I have lived in
12 Coos County for almost 37 years. I personally believe
13 that the Port is the key to our area's economic
14 development and that we do need development to keep this
15 community viable and a good place to raise children, who
16 are our future.

17 I have never been a member of the Sierra
18 Club, nor have I ever donated to the Sierra Club.
19 Although I have purchased their wildlife calendars from
20 time to time from various retail outlets, and I believe
21 some of that money would inure to their benefit.

22 During oral argument in particular, the
23 Port in this case has emphasized its statutory duty to
24 promote development. However, philosophically, morally,
25 ethically and not the least legally, environmental

1 concerns do require consideration. And who will speak
2 for the trees. To paraphrase Supreme Court Justice
3 William O. Douglas, the Sierra Club does. The Sierra
4 Club v. Morton, 1972 opinion. The Sierra Club does
5 represent the public interest in environmental concerns.

6 The Port is loathe to acknowledge that
7 there could be legitimate environmental concern with
8 their development plans. Development and the economic
9 benefits that inure to the community do not necessarily
10 trump environmental concerns.

11 To the extent this case turns on the
12 Port's requirement that the Sierra Club prove that it is
13 representing the public interest in its request of the
14 Port for public records, it would seem to be an enormous
15 waste of time and money for everyone involved, including
16 the Court. To paraphrase another source, ultimately the
17 Port's arguments can be characterized as full of sound
18 and fury signifying nothing.

19 This controversy began when the Sierra
20 Club made a public records request in the summer of 2011
21 for records, e-mails, and minutes or notes from meetings
22 pertaining to four different proposals involving coal
23 handling, storage, and export activities on Port
24 facilities.

25 A public body is allowed to charge a fee

1 to cover the actual costs of producing records upon
2 request. The law also allows a waiver or reduction of
3 fees. The Port denied the requested fee waiver and the
4 Sierra Club appealed to the district attorney.

5 This case comes before this Court because
6 the Port filed a complaint asking for, in essence,
7 reversal of the district attorney's opinion, which had
8 reversed in part the Port's denial of the requested fee
9 waiver by the Sierra Club.

10 The primary evidence in this case is the
11 series of letters between the parties. The following is
12 the summary of the evidence. By way of letter dated
13 June 30, 2011, Sierra Club made a public records request
14 for information relating to proposals to handle, export,
15 store or use coal at the Port; and asked that fees be
16 waived as release, quote, "release of the information
17 would serve the public interest," end quote.

18 Specifically, Sierra Club stated, quote,
19 "Disclosure of the documents is likely to benefit the
20 general public by increasing the public's understanding
21 of the use of Oregon's coastal property and insuring
22 that these areas are properly protected from
23 environmental harm. The information requested directly
24 relates to the mission of the Sierra Club and is not
25 intended for commercial use."

1 The Port's response dated July 8, 2011,
2 indicated that the, quote, "breadth of the request"
3 would require substantial staff time to locate and
4 review the records, quote, "for responsiveness and
5 significant attorney time due to many of the records or
6 portions of the records possibly being exempt from
7 disclosure."

8 An estimate of staff time and attorney
9 time was made on the assumption that there would be
10 1,500 pages to review. No explanation was provided as
11 to how the Port was able to make such an estimate of
12 pages at that early date, but the total estimated fee
13 was \$10,565.

14 Without, however, using the large cost as
15 a reason to deny the requested fee waiver, the Port
16 stated it did not have enough information to determine
17 whether the waiver would meet the public interest test.
18 The Port asked the Sierra Club to provide numerous lists
19 and documents so that the Port could, quote, "evaluate"
20 whether the request for the fee waiver was, quote,
21 "reasonable under the circumstances."

22 Sierra Club responded on or about
23 August 16th, 2011, that the estimated fee was excessive,
24 quote, "and may be intended to prevent the public's
25 access to information that is not exempt from

1 disclosure."

2 Sierra Club also suggested some of the
3 estimated attorney time for identifying and redacting
4 would not be necessary as three of the exemptions the
5 Port suggested might apply do not apply if the release
6 of information will benefit the general public.

7 Sierra Club attached proof of its
8 nonprofit tax-exempt status and directed the Port to
9 websites for copies of its Articles of Incorporation and
10 IRS form 990, all of which the Port had requested be
11 provided.

12 However, the Sierra Club declined to
13 provide the long list of additional information
14 requested as impermissible inquiries into factors not
15 relevant to fee waiver evaluation and/or private and
16 Constitutionally protected.

17 Sierra Club attached a declaration from a
18 representative of Sierra Club's Beyond Coal campaign in
19 Oregon with multiple exhibits to buttress their position
20 that the information requested from the Port is
21 unnecessary and not appropriate for the public dialogue
22 on the issue -- excuse me. The information, the public
23 records requested from the Port is necessary and
24 appropriate for the, quote, "public dialogue" on the
25 issue of coal exports and the environment.

1 The Sierra Club's letter was lengthy,
2 reviewing Oregon's public records law, and citing
3 numerous cases in support of its position. The Port
4 replied September 1, 2011. For the first time, almost
5 parenthetically, the Port suggested the real issue on
6 the fee waiver is whether it is in the, quote, "public
7 interest" of the citizens, presumably as taxpayers, to
8 have to pay for the costs of responding to Sierra Club's
9 request.

10 The Port then provided a detailed
11 explanation as to why the fee estimate was reasonable,
12 including much discussion as to what records or parts of
13 records might be exempt from disclosure, requiring
14 attorney review. The Port then again reiterated why the
15 requested information from the Sierra Club relating in
16 the Port's own words to, quote, "funding, management and
17 operations of the Sierra Club" was relevant to
18 determining whether fee waiver would be in the public
19 interest.

20 The Port says the claim that the Sierra
21 Club has no financial interest in the use of coal or the
22 proposed coal handling project has not been proven.
23 Quote, "The Port's requests for information are neither
24 unduly invasive or unduly burdensome. Rather, they are
25 made to determine whether Sierra Club's request for a

1 fee waiver is in the public interest and should be
2 granted," end quote.

3 The Port's letter concluded that no later
4 than September 30, Sierra Club should either supply the
5 requested information or state in writing that it would
6 not provide any further information. The Port would
7 then, quote, "endeavor", end quote, to respond to the
8 waiver request within 14 days.

9 Alternatively, the Port suggested, Sierra
10 Club should withdraw its fee waiver request and deposit
11 \$10,565 so that the Port could proceed to process the
12 records collection.

13 By letter dated September 30th, Sierra
14 Club reiterated its refusal to provide the requested
15 information and its position that it had met, quote,
16 "the recognized standard," end quote, for fee waiver.
17 Sierra Club stated it was open to discussions on
18 limiting the scope of the request so as to reduce the
19 amount of staff time needed to respond.

20 There were then some letters and apparent
21 telephone conversations back and forth between the
22 attorneys resulting in a narrowing of the request for
23 the public records. By letter dated November 15th,
24 2011, four and a half months after the initial request,
25 the Port denied the fee waiver request based on the

1 Sierra Club's failure, in the Port's opinion, to prove
2 that a fee waiver is in the public interest. The new
3 estimate of cost was \$19,981, based now on 2,500 pages
4 of documents and slightly more -- excuse me. Slightly
5 more than twice as many hours of estimated attorney time
6 for review as the original estimate.

7 No explanation was provided for the
8 significant increase after the scope of the request had
9 presumably been narrowed.

10 On February 15th, 2012, Sierra Club
11 appealed to the district attorney of Coos County the
12 Port's decision to deny access through, quote,
13 "unfounded assertion of various disclosure exemptions,"
14 end quote, and the unreasonable fee as well as the
15 denial of the fee waiver.

16 The district attorney -- the district
17 attorney found no evidence that the Port had denied the
18 request of the Sierra Club for the records and assumed
19 that the public interest test had been met. He
20 therefore addressed only the denial of the fee waiver
21 request.

22 The district attorney found that the
23 estimated fee for the copying of the documents, \$3,315,
24 was a reasonable fee. However, the district attorney
25 did not find that the estimated attorney fee, \$16,666,

1 was reasonable for several different reasons, which he
2 articulated. He basically concluded that the -- because
3 the attorney fee would not be reasonable, it should be
4 waived by the Port.

5 This case comes before this Court because
6 the Port filed a complaint asking for in essence
7 reversal of the district attorney's opinion. The Sierra
8 Club's answer and counterclaim asserts that public
9 records are to be produced without charge or at a
10 substantially reduced fee if disclosure will primarily
11 benefit the general public; and therefore, the "unlawful
12 fees," in quotes, should be waived and its attorney fees
13 and costs should be paid by the Port.

14 Additionally the Sierra Club complains
15 that the Port does not apparently have a written policy
16 for how it calculates the fees that it charges for
17 responding to requests, and the proposed fees were not
18 reasonably calculated to reimburse the actual costs
19 associated with the request.

20 Finally, the Sierra Club alleges that,
21 quote, "The Port has engaged in a pattern and practice
22 of making improper inquiries to public records
23 requestors designed to stifle the public's access to the
24 requested information, rather than being a good faith
25 effort to evaluate the merits of a fee waiver request,"

1 end quote.

2 Sierra Club has moved for partial summary
3 judgment on the ground there is no genuine issue as to
4 any material fact and that it is entitled to judgment as
5 a matter of law. Sierra Club represents that if this
6 Court grants this motion, it will dismiss its second
7 counterclaim and that will resolve all issues before the
8 Court.

9 The judgment requested by Sierra Club is
10 to order Port to release records requested without fees
11 or costs assessed or at a substantially reduced fee.

12 Sierra Club further seeks a declaration
13 the Port has established a pattern and practice of
14 responding to public interest fee waiver requests by
15 conditioning the response to such requests upon the
16 requestor responding to legally irrelevant, burdensome,
17 and Constitutionally invasive interrogatories.

18 Further, that this is a violation of
19 42 U.S. Code Section 1983. Sierra Club requests an
20 order enjoining the Port from posing such questions now
21 and in the future.

22 The Port's focus has been on requiring
23 Sierra Club to prove that it was acting in the public
24 interest with its request and/or that the Sierra Club is
25 a public interest group. Sierra Club does not have to

1 prove that to the Port. Sierra Club did briefly explain
2 how it intended to disseminate the information obtained
3 and why it is important for the public to know more
4 about the proposed plans.

5 Quite frankly, that is self-evident.
6 There is clearly a potential environmental impact from
7 the possible development of a coal exporting facility.
8 The Port's position seems to have been based on a
9 misinterpretation of the clear wording of Oregon's
10 Public Records Law.

11 ORS 192.440(5) provides: The custodian of
12 any public record may furnish copies without charge or
13 at a substantially reduced fee if the custodian
14 determines that the waiver or reduction of fees is in
15 the public interest because making the record available
16 primarily benefits the general public.

17 Whether there could be some donors or
18 directors or other individuals connected somehow with
19 the Sierra Club who are also involved with competing
20 energy resources or looking at other potential sites for
21 this development is simply not relevant in a
22 determination as to whether making the records available
23 will primarily benefit the public.

24 It is true that ultimately the waiver or
25 reduction of fees is discretionary with the public body.

1 However, the public body must act reasonably. The
2 Oregon Court of Appeals has said that reasonableness is
3 an objective standard which requires examination of the
4 totality of the circumstances presented. Requests for a
5 fee waiver or reduction must be evaluated on a
6 case-by-case basis. And this is from the In Defense of
7 Animals opinion, 2005.

8 Public bodies may seek additional
9 information from a requestor to help clarify the basis
10 for seeking a fee waiver. In determining whether the
11 requestor has established a sufficient public interest,
12 relevant factors include the requestor's identity, the
13 purpose for which the requestor intends to use the
14 information, the character of the information, whether
15 the requested information is already in the public
16 domain, and whether the requestor can demonstrate the
17 ability to disseminate the information to the public.

18 And that's from the Attorney General's
19 Manual on Public Records and Public Meetings.

20 "Thus," and this is quoting from In
21 Defense of Animals, "a waiver or reduction of fees for
22 the furnishing of a public record is in the public
23 interest because making the record available primarily
24 benefits the general public as provided in ORS
25 192.440(4) when the furnishing of the record has

1 utility; indeed, its greatest utility to the community."

2 An almost identical response had been sent
3 by Port counsel in January 2011 to a different group
4 which requested public records on a different Port
5 project. As well as subsequently in February 2012 to a
6 group representing or requesting similar documents as
7 the Sierra Club on the coal handling proposals.

8 The only real differences between the
9 Port's response to all three is that it became
10 increasingly specific as to the potential charge
11 involved for producing the requested records.

12 All three groups, specifically including
13 Sierra Club, stated a detailed basis for the fee waiver.
14 A possible distinction can be drawn in that the other
15 two groups do not have the same profile or instant
16 recognition of the Sierra Club; and it may well be
17 prudent for a public body to make certain, despite the
18 averments that a group is representing the public
19 interest versus a private interest, does intend to
20 disseminate the information to the public. But the
21 pattern of obfuscation seems clear: To discourage the
22 pursuit of the request.

23 It is this pattern which is bothersome.
24 It is true that it is within the public body's
25 discretion to grant or deny in part or in full a waiver.

1 But the public body needs to act in good faith.
2 Basically the Port has said: To produce the records you
3 have requested will be at a potentially enormous cost.
4 And in order to prove that you would be entitled to a
5 waiver, you will need to provide us reams of material
6 and respond to invasive and burdensome questions waiving
7 some of your Constitutionally protected rights.

8 The Sierra Club has cited numerous cases
9 from the United States Supreme Court to support the
10 applicable Constitutional protections: Freedom of
11 association, including donors, under the First and
12 Fourteenth Amendments.

13 And without repeating the review that
14 Sierra Club has presented, I simply will point to
15 Page 16 of their motion for partial summary judgment and
16 the citations of the cases Buckley v. Valeo, Kuser v.
17 Pontikes, Shelton v. Tucker, NAACP v. Alabama.

18 A strong inference can be drawn that the
19 Port's purpose was to discourage the Sierra Club's
20 pursuit of the records by forecasting a large
21 anticipated expense and by burdening the Sierra Club
22 with needing to respond by producing its own internal
23 records, which would take considerable time as well as
24 in many instances being confidential and objectively
25 unreasonable.

1 Further, there was -- has been no
2 explanation provided -- there was no explanation
3 provided at the outset for the almost doubling of the
4 estimated fees after the Port determined that it could
5 not consider the fee waiver request.

6 The Port's arguments against the Sierra
7 Club's motions are largely disingenuous and/or a
8 misinterpretation of the law. The Port objects to the
9 Sierra Club's citations to federal law; and without
10 deciding the applicability of those decisions under the
11 federal Freedom of Information Act to this case, the
12 Court is not relying on any of those decisions, nor the
13 Sierra Club's analysis that flows therefrom.

14 According to the Port, the Port's, quote,
15 "plain reading of the Oregon statute," end quote, on
16 public records says it uses the balancing test identical
17 to the 1982 version of the federal Freedom of
18 Information Act in which the agency determines if a
19 waiver or reduction is in the public interest because
20 the disclosure primarily benefits the general public.

21 The Port states this is, quote, "critical"
22 because a public body must have information about the
23 private benefit of the information to the requestor.
24 And without that information, the agency cannot
25 determine whether the general public is the primary

1 beneficiary of the disclosure. Therefore, not receiving
2 the requested information from the Sierra Club, the Port
3 had no choice but to deny the waiver request.

4 This had been the Port's position from the
5 outset. All of the correspondence seemed to suggest
6 that if the Sierra Club would only give the Port the
7 information it requested, the Port could then determine
8 whether it met the public interest test. The focus has
9 been on the Sierra Club's motives, as opposed to the
10 utility of the information to the community as a whole.

11 Further illustrating the Port's
12 intransigent position and/or its misreading of the law,
13 it's argued -- it argues in its memorandum that should
14 the requested injunction be granted, the, quote, "Port
15 must take what they say at face value"--they mean about
16 the public interest--"and perform no investigation of
17 their assertions." The Port must absorb the cost of the
18 public records request, which could reach between 50,000
19 or \$60,000.

20 In other words, apparently the Port is
21 saying that if the request primarily benefits the
22 public, according to the requestor, it must grant the
23 waiver. This is not a correct reading of the law.

24 As to the Constitutional infringements,
25 the Port argues that the Court, quote, "must determine

1 if the Port has demonstrated that the information it
2 sought is rationally related to a compelling
3 governmental interest," end quote.

4 It explains that the, quote, "compelling
5 governmental interest," end quote, is the Port's, quote,
6 "obligation to gather all information that it can to
7 make an objectively reasonable decision in exercising
8 its discretion," end quote.

9 If that is something the Court must
10 determine, the Court finds that the Port has not proven
11 that this is a compelling interest. Nor does the Court
12 find that the information sought by the Port is
13 rationally related to making a reasonable decision as to
14 a fee waiver.

15 Again, the Port continues to misunderstand
16 or misrepresent the law. It is not a discretionary
17 determination as to whether or not a request serves
18 primarily the public interest. The discretion to be
19 exercised is in determining whether or not to grant the
20 fee waiver or reduction.

21 The Port either did not consider at the
22 outset or was purposely waiting to disclose its position
23 on the other side of the scale for the balancing. From
24 its memorandum, it is still not entirely clear that the
25 Port understands that it can make the decision that the

1 request is in the public interest, but a fee waiver
2 still need not be granted.

3 Again, this entire process could have been
4 shortened if the Port had simply accepted the obvious,
5 that the Sierra Club's request is primarily in the
6 public interest, but had explained the reasons it could
7 not or would not grant a waiver or reduction of the
8 fees.

9 The Port contends that in the exercise of
10 a public body's discretion to grant or deny a fee waiver
11 request, factors that should be considered, according to
12 the Attorney General's Manual, include the financial
13 hardship on the public body, volume of records
14 requested, et cetera.

15 Again, this basically is just restating
16 that requests have to be evaluated on a case-by-case
17 basis. The decision in *In the Defense of Animals v.*
18 *OHSU* directs a public body to consider all of the
19 relevant circumstances without explaining how they
20 should be weighed as an overall assessment of
21 reasonableness.

22 It is true that the Attorney General
23 Manual talks about factors relevant to evaluating the
24 burden include financial hardship on the public body,
25 the extent of time and expense and interference with the

1 business of the public body, the volume of the records
2 requested, the necessity to segregate exempt from
3 nonexempt materials, and the extent to which the
4 inspection -- and I think this is in -- instead of
5 receiving copies, the record is insufficient for the
6 public interest or for the particular needs of the
7 requestor.

8 This all is after the Port has said this
9 is in the public interest. These are then the tests or
10 the -- the evaluation that the Port can make as to
11 whether or not to grant the waiver. The Attorney
12 General Manual is instructive of examples when requests
13 might not be in the public interest and/or where the
14 requestor fails to demonstrate the ability to
15 disseminate the information to the public or to
16 understand the information requested.

17 These examples could have been generally
18 useful to the Port in making the determination it still
19 refuses to make. There is nothing in the record to show
20 that the Port did the evaluation of the burden on the
21 public body. Its primary focus throughout, including in
22 its memorandum in opposition to the Sierra Club's motion
23 for partial summary judgment, continues to be that it
24 does not have enough information to determine whether
25 the Sierra Club's request meets the public interest

1 test.

2 The Port continues to insist that it
3 cannot determine whether the Sierra Club has a financial
4 information in the dissemination of the information and
5 whether or not it would primarily be for the personal
6 benefit of the Sierra Club as opposed to the public.

7 During oral argument and in its
8 memorandum, the Port is also emphasizing Sierra Club's
9 participation in an administrative proceeding with the
10 DSL, the Division of State Lands, involving apparently
11 an appeal of a permit issued to the Port for a liquified
12 natural gas export facility; as well as accepting a
13 donation of over \$25 million from a competing energy
14 provider as indication that Sierra Club is not acting in
15 the public interest in its request for the public
16 records.

17 Neither of these, quote, "facts," were
18 known at the time of the Port's denial of the waiver
19 request, nor either of these facts," end quote, nor the
20 others listed in the memorandum a proper basis for
21 denying a fee waiver request. Sierra Club's reply
22 memorandum spells this out persuasively.

23 The Port has not explained the
24 reasonableness of the doubling of the estimated fee
25 between the time of the initial request and the Port's

1 ultimate denial of the waiver. Nor has the Port proven
2 that the original estimated fee itself was reasonable.
3 The DA's opinion reduced that fee as unreasonable.
4 Ultimately, whether or not the fee is reasonable does
5 not need to be determined by this Court based on its
6 findings of the Port's bad faith.

7 The Sierra Club's reply memorandum in
8 general does a thorough job of refuting or
9 distinguishing each of the Port's arguments.
10 Particularly persuasive are the Sierra Club's analysis
11 of the Port's misapplication and/or misunderstanding of
12 the, quote, "three-part analysis to evaluate fee waiver
13 or reduction requests" as set forth in the Attorney
14 General's Manual; and the real crux of the resistance by
15 the Port to acceding to the Sierra Club's request for
16 the records.

17 The Port quotes Far West Landscaping for
18 its definition of abuse of discretion. And that
19 definition seems to apply directly to the Port's actions
20 and position in this dispute. The Port has abused its
21 discretion.

22 20 months ago, a request was made for
23 public records and that request has still not been
24 granted. The parties are now here in court making the
25 same arguments as 20 months ago. Two simple questions

1 were all that needed to be answered at the outset: Is
2 disclosure in the public interest? Will Sierra Club
3 disseminate information to the public? Those questions
4 were answered at the outset.

5 The Port seems confused about the in
6 public interest. Implicit throughout is the idea that
7 development is in the public interest and therefore an
8 environmental advocacy group's efforts would not be.

9 This litigation could probably have been
10 avoided if, at the beginning, the Port had responded to
11 the Sierra Club that too much material was being
12 requested. The Port has too small of a staff to
13 respond. Therefore, the Port cannot afford to waive the
14 fee. Can the Sierra Club reduce the scope of their
15 request? Are there other cost-saving ideas?

16 Instead, the Port responded with prove
17 that you are acting in the public interest by providing
18 reams of documents for Port staff to review, which of
19 course would negate the claim of limited staff
20 resources. And by the way, much of those documents
21 would be Constitutionally protected, so you'll need to
22 waive the First and Fourteenth Amendments.

23 The Port has continued to demand those
24 documents by filing a motion to compel production after
25 this case was initiated by the Port. Ostensibly the

1 Port would contend that something in those documents
2 would prove that the Sierra Club's request for the
3 records would not primarily serve the public interest;
4 and that therefore, the Port's decision was proper after
5 all.

6 Quite frankly, this is either a fishing
7 expedition or further proof of the Port's stonewalling
8 of the request or both. It plays well to the press,
9 perhaps, but it is a direct violation of the spirit of
10 the Public Records Law, which encourages disclosure. By
11 its actions, the Port has effectively delayed, by almost
12 20 months, disclosure; and certainly has increased
13 dramatically the cost to the public body as well as the
14 Sierra Club by its tactics.

15 The strong inference can be drawn that the
16 Port's actual intent was to force the Sierra Club to
17 fold its tent and go away. There is -- there was never
18 any indication by the Port in its -- by the Port, in its
19 correspondence, that ultimately it could or would deny
20 the waiver request, however the Sierra Club might
21 respond to its request for information. It simply
22 continued to insist that without additional information,
23 the Port could not make a decision on the fee waiver
24 request.

25 There was never a suggestion by the Port

1 of a partial waiver, nor any acknowledgment in the
2 correspondence that the Port considered the ultimate
3 decision to waive or not discretionary. The Port has
4 established a prima facie case for bad faith in its,
5 quote, "refusal to process," unquote, the fee waiver
6 request without the information requested, coupled with
7 the unreasonable fees the Port has in effect denied
8 access to the public records.

9 Therefore, the Sierra Club has established
10 a prima facie case for a fee waiver. The Court will
11 adopt, by this reference, the argument presented on
12 Pages 19 through 25 of the Sierra Club's motion for
13 summary judgment.

14 In conclusion, the Court shall grant the
15 motion. If the pleadings, depositions, affidavits,
16 declarations, and admissions on file show that there is
17 no genuine issue as to any material fact and that the
18 moving party is entitled to prevail as a matter of law,
19 ORCP 47 C.

20 And quoting from Kluge v. Oregon State
21 Bar: "Oregon has a strong and enduring policy that
22 public records and governmental activities be open to
23 the public. The guiding principle in Oregon is to
24 protect the public's right to inspect public records."

25 The Sierra Club has not refused to provide

1 the necessary information to the Port for it to make a
2 decision on the fee waiver. The Port's inquiries to the
3 Sierra Club were invasive, burdensome, and harassing;
4 and sought Constitutionally privileged information
5 irrelevant to a fee waiver determination. This is a
6 violation of Section 1983, 42 U.S. Code.

7 It has also been proven that the Port has
8 demonstrated a pattern of subjecting other environmental
9 interest groups to this same unlawful conduct.

10 The Court finds that the Port, through its
11 refusal to acknowledge that the Sierra Club's request
12 was in the public interest and its requirement that the
13 Sierra Club pay a fee of just short of \$20,000 for the
14 public records has acted in bad faith and constructively
15 denied access.

16 There is no genuine issue, I find, as to
17 any material fact. The moving party is entitled to
18 prevail as a matter of law. The Sierra Club's motion
19 for summary judgment is granted. The Port's motions are
20 denied.

21 The Port shall respond to the request for
22 public records and waive all fees. Nominal damages of
23 \$1 shall be awarded, given the 1983 violation. And the
24 Port shall be enjoined from violating the law in future
25 requests for public records.

1 The Sierra Club is also entitled to
2 attorney fees and costs. The Sierra Club shall prepare
3 the form of limited judgment. And that concludes my
4 oral opinion.

5 And with that, unless somebody has
6 something they want to say, we'll go off the record.

7 Mr. --

8 MR. BAHR: Thank you, Your Honor. This is
9 Dave Bahr for Sierra Club. So in the absence of a
10 written opinion, I'm just thinking out loud here.
11 Forgive me because I'm not that familiar with your local
12 practice.

13 We do have a trial date tentatively
14 scheduled for next Thursday. Will this oral decision
15 suffice to negate that trial date or what -- what are
16 the steps we need to do to cross that T and dot that I?

17 THE COURT: Well, on rare occasion -- I
18 shouldn't say rare occasion. Frequently the Court will
19 make oral decisions at the conclusion of a trial. I am
20 not of the habit of making lengthy oral decisions at the
21 conclusion of a trial, nor certainly not in the instance
22 of summary judgment.

23 But because the trial was set for next
24 week, the parties had agreed that this would be the only
25 realistic way to proceed. It -- the --

1 MR. BAHR: Okay.

2 THE COURT: My oral opinion, rough as it
3 is, has been recorded. Based on my findings, there
4 would be no reason for a trial. Certainly the Port
5 might choose to file an appeal from the limited
6 judgment. But unless somebody disagrees, I see no
7 reason for a trial to happen next week. I have made a
8 ruling on all the issues.

9 If the parties want a written version of
10 this opinion, although I could certainly do something
11 with fancy type and footnotes, it really has been given
12 orally so it would be more appropriate to have a court
13 reporter transcribe my inarticulate ramblings this
14 morning than it would be for me to polish this up and --
15 and present a perhaps better opinion.

16 Mr. Stebbins?

17 MR. BAHR: Oh, okay. And --

18 THE COURT: Mr. Stebbins?

19 MR. BAHR: Thank you, Your Honor. And you
20 anticipated my next question. As far as the form of
21 the -- the order, I'm assuming you would look for
22 something simple that would not replicate the detailed
23 analysis that you just provided orally.

24 THE COURT: That would be my thought,
25 again, because of the interest of time. Now, unless

1 Mr. Stebbins sees any objection from the part -- on the
2 part of the Port, the limited judgment could be entered
3 down, you know, a week or two or three. And a hard copy
4 of the oral -- of the transcript of my oral opinion
5 could be attached as an opinion. That would obviously
6 take some additional time.

7 I don't know that there's any rush to
8 formally enter the limited judgment. And it would
9 certainly give the Port more time to consider its
10 options.

11 MR. STEBBINS: Procedurally, there's no
12 rush to judgment on the limited judgment, so to speak.
13 And I appreciate attaching the transcribed copy of what
14 happened today to the judgment.

15 THE COURT: All right. And, Mr. Bahr, you
16 heard that?

17 MR. BAHR: Yes, I heard that and I agree
18 with that, Your Honor. So I guess we can -- we'll be
19 ordering a copy of -- of the tran -- or of the recording
20 and we'll try and get that process going as quickly as
21 possible.

22 THE COURT: All right. And our basic
23 practice in Coos County is a 28-day notice of dismissal.
24 If something hasn't been submitted to the Court, you
25 would have to -- if you aren't going to be able to get

1 this in within 28 days, you would need to file a motion
2 requesting an extension of time to file the form of
3 limited judgment.

4 I'm assuming you would hope to get it done
5 before 28 days, but I'm just telling you that that's the
6 process here, is we do make sure that cases don't sit
7 around for too long. Although there's no rush to
8 judgment, to quote Mr. Stebbins.

9 At the same time, we don't want cases to
10 get cobwebs while we're waiting for the attorneys to tie
11 up the loose ends.

12 MR. BAHR: Right. Well, I think we'll --
13 we'll try and get this going as quickly as possible,
14 Your Honor. And I'd like to go on record also, I'm sure
15 counsel for the Port would join me in this in thanking
16 you very much for the Herculean effort of trying to
17 process and resolve this large -- large and complex
18 dispute and frustration in the short time that you had
19 to go through it. So we -- we very much appreciate
20 that.

21 THE COURT: Yes. And I was -- I
22 definitely, because the motion for a reset of the trial
23 had been denied, I did not think it would be fair to
24 anyone to -- to wait until the final hour. I realize
25 that even today was a little late, but that was the best

1 I could predict I could do. And even then I was up till
2 the wee hours last night. Or the wee hours this
3 morning, I should say.

4 All right. So the trial --

5 MR. BAHR: Thank you very much.

6 THE COURT: The trial is canceled at this
7 point in time, at least, based on whatever the Port
8 might want to do and whether the case could conceivably
9 come back. But at this point in time, there would be no
10 need for next week's trial.

11 So we will cancel that off the docket and
12 we will expect a form of limited judgment in the near
13 future from the Sierra Club.

14 MR. BAHR: Thank you, Your Honor.

15 MS. YARNALL LOARIE: Thank you, Your
16 Honor.

17 THE COURT: And you folks may hang up now
18 and we will go off the record.

19 MR. BAHR: All right.

20 (End of proceedings, 11:47.)

21
22
23
24
25

1 STATE OF OREGON

SS.

2

County of Multnomah

3

4 I, Susan Bulman, certified shorthand reporter,
5 hereby certify that I reported in stenotype all
6 testimony adduced and other oral proceedings had
7 from a CD recording in the foregoing transcript;
8 that thereafter my notes were reduced to typewriting
9 under my direction; and that the foregoing
10 transcript, pages 1 through 32, both inclusive,
11 contains the full, true, and correct record of all
12 such testimony adduced and oral proceedings had and
13 of the whole thereof to the best of my abilities.

14 Witness my hand at Portland, Oregon, this 31st
15 day of January, 2013.

16

17

18

19

20

21

22

23

24

25



Susan Bulman

Susan Bulman, RDR, CSR
Registered Diplomate Reporter