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ATTORNEY GENERAL OF WASHINGTON

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August 17, 2020

Via U.S. mail and email

Michael P. Klein
Senior Advisor & Acting Agency Counsel
Adam Bodner
Executive Director
Public Buildings Reform Board
1800 F Street, NW
Washington, DC 20405

RE: Freedom of Information Act Request, PBRB-2020 01

Mr. Klein and Mr. Bodner:

As you are aware, on February 3, 2020, we filed a FOIA request on behalf of the Attorney General of the State of Washington seeking records and communications related to this agency's recommended sale of the federal facility at 6125 Sand Point Way NE, Seattle, WA 98115 that houses the National Archives at Seattle. Notwithstanding your agency's agreement to begin producing materials responsive to the FOIA Request back in February, you have now demanded payment of \$65,400 prior to releasing any documents. This demand is untimely, unreasonable, and unlawful, and we request that you immediately withdraw it and begin producing responsive records without delay.

The National Archives at Seattle is an institution of significant regional and local importance, which provides public access to permanent records created by Federal agencies and courts in Alaska, Idaho, Oregon, and Washington. It houses critically important tribal and treaty records relating to the federally recognized tribes and native corporations in the Pacific Northwest, including records from Bureau of Indian Affairs offices, Indian agencies, and Indian schools. The facility also maintains 50,000 files related to the Chinese Exclusion Act of 1882, as well as some records related to the internment of Japanese-Americans in World War II. The National Archives at Seattle is routinely used by researchers, historians, genealogists, and tribes from across the Pacific Northwest.

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Last year, your agency produced a report (the PBRB Report),¹ in which it recommended the sale of the federal facility that houses the National Archives at Seattle and proposed relocating the records and archival materials at the Seattle facility to facilities outside of the Pacific Northwest—to facilities in Kansas City, Missouri, and Riverside, California. Before recommending the sale of the federal facility housing the National Archives at Seattle, PBRB did not conduct outreach to state, local, or tribal officials. As a result, no such officials were given an opportunity to present information detailing how the pending sale would harm them and their constituents. There were also no public hearings in Washington, Idaho, Oregon, or Alaska, where members of the public could have provided input and information about the importance of keeping records at the Seattle facility in the Pacific Northwest. As a result, there was significant public outrage and confusion when the closure of the National Archives at Seattle was made public.²

In light of the critical regional importance of the records held at the National Archives of Seattle and the absence of outreach by your agency to state, local, and tribal officials on the proposed sale, this Office (the AGO) filed a FOIA request (the FOIA Request) seeking documents on this important issue on February 3, 2020.

At the request of PBRB, on February 24, 2020, counsel from the AGO met telephonically with representatives from your agency (including Mr. Bodner) to discuss the FOIA Request. During that call, the AGO declined to narrow the scope of its FOIA Request. But to expedite the production of responsive records, the AGO agreed to receive documents from PBRB on a rolling basis and also agreed to the prioritization of records relating to the proposed sale of the Seattle facility. Following that call, the AGO sent PBRB an email summarizing the parties' agreement with respect to the processing of its FOIA Request and asked PBRB to respond if it had a different understanding. PBRB never responded to the State's email, nor did it request more time to process the State's request or deny the State's request for a fee waiver.

Instead, after nearly five months of ignoring your agreement to provide the State with responsive documents, new counsel for PBRB emailed the State on July 20, 2020 to advise that PBRB is requiring advanced payment of more than \$65,000 from the State before releasing responsive documents. Completely ignoring the State's prior request for a fee waiver, you responded that PBRB had "solicited bids from service providers to redact the material for production to your office" and "[t]he lowest bid for the service is Sixty Five Thousand Four Hundred Dollars

¹ <https://www.pbrb.gov/assets/uploads/20191227%20High%20Value%20Assets%20Report%20as%20Required%20by%20FASTA.pdf> (last visited Aug. 13, 2020).

² See, e.g., 'Terrible and disgusting': Decision to close National Archives at Seattle a blow to tribes, historians in 4 states, The Seattle Times (Jan. 25, 2020), https://www.seattletimes.com/seattle-news/terrible-and-disgusting-decision-to-close-national-archives-at-seattle-a-blow-to-tribes-historians-in-4-states/?utm_source=referral&utm_medium=mobile-app&utm_campaign=ios; Don't send Seattle's federal archives across the country, The Seattle Times (Jan. 31, 2020), <https://www.seattletimes.com/opinion/editorials/dont-send-seattles-federal-archives-across-the-country/>; First 'panic,' then a battle to keep the National Archives in Seattle, KUOW/NPR (Feb. 6, 2020), <https://www.kuow.org/stories/first-panic-then-a-battle-to-keep-the-national-archives-in-seattle>.

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(\$65,400.00).” The communication further stated “[i]f you would like us to proceed, we will need you to provide us the necessary funds to defray the stated cost.” We now ask you to reconsider this unreasonable response.

First of all, during the AGO’s call with PBRB on February 24, 2020, PBRB indicated it would begin to produce documents to the AGO on a rolling basis and would prioritize records related to the proposed sale of the Seattle facility. At no point thereafter did your agency ever indicate it would not fulfill this agreement or require an exorbitant fee prior to producing records that are clearly in the public interest. We are disappointed that your agency now appears to have reneged on its agreement.

Second, although your agency still has not provided any formal determination on the State’s request for a fee waiver (and have therefore waived your ability to do so), your July 20, 2020 email indicates an implicit denial. Even assuming your agency could untimely deny the State’s fee waiver request at this late date, we request that you reconsider that determination. As we previously explained, a fee waiver should be granted to the AGO pursuant to 40 C.F.R. § 2.107(l), as the Attorney General is a public officer of the State of Washington and has no commercial interest in this request. Furthermore, disclosure of the requested records is in the public interest and will contribute significantly to public understanding of how the federal facility housing the National Archives at Seattle was selected for sale. Given the intense public confusion and outcry that came in response to the decision by PBRB and the Office of Management and Budget (OMB) to sell the building that houses the National Archives at Seattle, documents related to this determination would greatly add to the public’s understanding as to how this important decision was made, particularly in light of PBRB’s failure to hold any public meetings in the Pacific Northwest or conduct outreach to local, state, and tribal officials on the issue as anticipated by the Federal Assets Sale & Transfer Act of 2016 (FASTA). Disclosure of these materials is likely to contribute significantly to public understanding of PBRB’s operations and activities. *See supra* n.2.

The AGO has played a key leadership role on this issue since the closure of the National Archives at Seattle was announced. Through its public outreach, its communications with other state, local, and tribal leaders, and its robust public following through social media and other public platforms, the AGO has an extensive platform upon which to distribute the materials it receives to other interested stakeholders, including on its website. Indeed, in past FOIA cases, the AGO has provided access to the documents it has received on its website and could do so here.³ Accordingly, we ask you to reconsider your decision to request payment and to instead grant the AGO’s requested fee waiver and immediately release all responsive materials.

³ *See, e.g.*, <https://www.atg.wa.gov/news/news-releases/ag-ferguson-s-15th-consecutive-legal-victory-against-federal-government-forces> (press release with link to documents provided from the FERC in response to FOIA action) (last visited Aug. 17, 2020); <https://www.atg.wa.gov/news/news-releases/attorney-general-s-22nd-legal-victory-against-trump-administration-forces-epa> (press release with link to documents provided from the EPA in response to FOIA action) (last visited Aug. 17, 2020).

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Third, you indicated that you had “solicited bids from service providers to redact the material for production to your office” and “[t]he lowest bid for the service is Sixty Five Thousand Four Hundred Dollars (\$65,400.00).” Given the nature of the FOIA Request (i.e., the process of identifying and recommending federal properties for sale), we are puzzled by the type and volume of information that would merit such extensive and costly redaction. Please provide additional documentation on this issue, including what the \$65,400 estimate entails, which contractors were solicited to submit bids, and which contractor submitted the lowest bid.

Fourth, to the extent PBRB remains unwilling to grant the AGO’s requested fee waiver, we ask that you immediately provide all reasons for the denial.

Washingtonians and all residents of the Pacific Northwest, including the many federally-recognized tribes and native corporations in this region, deserve to know how your agency decided to sell the federal facility that houses the National Archives at Seattle and relocate these critical historical records across the country. We therefore request that you immediately grant the State’s fee waiver and release all responsive materials identified in response to the FOIA Request without any further cost or delay. Please confirm your agency will begin producing responsive records no later than August 31, 2020, or our office will take appropriate action.

Sincerely,

/s/ Lauryn K. Fraas

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