



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

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December 23, 2010

Richard Ellmyer
9124 N. McKenna
Portland, OR 97203

Kalei Taylor
Deputy City Attorney
Office of the City Attorney
1221 SW Fourth Avenue, Suite 430
Portland, OR 97204

Re: Petition of Richard Ellmyer received December 14, 2010 for a waiver of fees associated with the disclosure of certain records of the City of Portland

Dear Mr. Ellmyer and Ms. Taylor:

On this public records petition, ORS 192.410 et. seq., petitioner Richard Ellmyer requests the District Attorney to order the City of Portland to waive the fees charged for the production of the following records:

A tab delimited text file of all city employees, except those who have a special security need, that include at least the following three fields:

- 1. First Name**
- 2. Last Name**
- 3. Email Address**

If there would be no additional cost then the following fields would also be useful;

- 4. Phone number** – **5. Department** – **6. Job Title**

This petition is the culmination of numerous emails between petitioner, Deputy City Attorneys Matthew Farley and Kalei Taylor, City Commissioner Amanda Fritz, and this office. Petitioner's request is for a large amount of potentially sensitive material. It has proved difficult for both sides to reach an understanding and mutual accommodation.

Petitioner expressed a desire to have the information given to him electronically in a user friendly format. In a letter to this office dated September 7, 2010, Mr. Farley expressed

concern over using “a specified format for each of the 8,000 or more employees of the City of Portland.” He attached an affidavit of Portland Technology Information Manager Logan Kleier who concluded the online posting would “provide spambots and phishing (identity theft) entities the ability to steal employee identity information and exploit vulnerabilities within the City’s communications systems.” Nonetheless, The City acceded to the request.

The City submitted an excel spreadsheet to help explain its cost estimate of \$625.85.¹ This estimate did not include the then 13 hours spent by the City Attorney’s Office, although part of this cost would not be recoverable. See ORS 192.440(4)(b). According to the City, the employee information “is housed in numerous data bases. Some employee information is housed by bureaus, not centralized.”

Petitioner unsuccessfully sought to modify his request to avoid bureaus that have no redaction claims. The Bureau of Technology Services, the Portland Police Bureau, and the City Attorney all declined to waive fees. Human Resources would be required to “contact all bureaus other than BTS, PPB and City Attorney for any employees who may be subject to redaction based on public safety officer exemptions, those with stalking orders, TROs, etc.” After all bureaus were contacted and the potentially exempt employees were identified, it would then be necessary to apply the possible exemptions to those employees.

On his initial request to the City, petitioner noted that “[m]any citizens, including me, have address books with large numbers of city employees with whom we communicate on a regular basis.... It is selfevident that this information in the universally accessible tab delimited text form, would be of considerable use to the public and the press. I intend to post this file on my website and distribute it to any citizen who requests it if the mayor’s office or any other city official or bureau is not interested in posting it.”

In an August 26, 2010 email to Oregon Attorney General John Kroger and others, petitioner maintained that “Citizen interest in access to public employee contact information via the Oregon Public Records Law could be found in every public jurisdiction throughout the state. It is a FUNDAMENTAL Public Record Law issue. *Who are we paying to carry out our public business, what do they do and how do we contact them in any manner we choose.*” Petitioner asserted in a November 8, 2010 email to the Mayor and the District Attorney that “[i]t has been *indisputably established* that all public employee contact information is NOT already available on the City’s website and is NOT readily accessible to the public.”

The petition itself contains no argument over the reasonableness of the cost estimate or whether the public interest warrants a fee waiver or reduction. Petitioner said the City Attorney’s Office “has so deliberately conflated the cost estimates to include everything and everybody that it is impossible to ask for public data that avoids the most costly requests.”

¹ The explanation of the spreadsheet is found on p. 2 of the November 9, 2010 letter of Deputy City Attorney Taylor. It is attached to this order.

Petitioner went on to conclude that “[p]urposefully conjoining all the costs without specificity of department and purpose should make a judgment by the Multnomah County District Attorney very easy with regards to waiving fees that are so unjustified and exorbitant that they constitute a denial of records in and of themselves.”

A November 18, 2010 email to Commissioner Fritz claimed the fee was “exorbitant and does not reflect the actual cost of producing the records.” The proposed charge was reviewed by Commissioner Fritz and determined to be very reasonable. “The information you request would take considerable staff time to prepare, even for just my five bureaus.” (Email dated November 25, 2010).

DISCUSSION

I. Actual Costs

The Public Records Law expressly authorizes a public body to establish fees “reasonably calculated to reimburse it for its actual cost in making such records available.” ORS 192.440(4)(a). The public body is permitted to include in its fees “costs for summarizing, compiling or tailoring the public records, either in organization or media, to meet the person's request.” ORS 192.440(4)(a).

The City of Portland provided a response to the petition in a December 20, 2010 letter from Deputy City Attorney Kalei Taylor. She noted that the City had a Standard Fee Schedule (available on the City’s website) and that the City’s labor costs “are determined by the person performing the work multiplied by a formula provided in the City Code.” Ms. Taylor estimated that roughly 20 hours have now been spent responding to the petitioner. None of the time for two Deputy City Attorneys, a paralegal, the Chief Technology Officer, the Chief Security Officer and legal assistants “is represented in the cost estimate of \$625.85.”

According to Ms. Taylor, a “portion of the fees/cost estimate includes the time for a Bureau of Technology Services employee to perform the data extraction from the Exchange data base, convert the information into the format requested by Petitioner, and then download that information onto a suitable media for Petitioner.”

Petitioner has provided this office with no contrary information or new arguments.

II. Public interest

The public agency may provide the records without charge or at a reduced fee “if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public.” ORS 192.440(5). The Attorney General has recognized that even if making the record available is in the public

interest, a public body may still deny a fee waiver or reduction if warranted by certain factors:

...any financial hardship on the public body, the extent of time and expense and interference with the business of the public body, the volume of the records requested, the necessity to segregate exempt from non-exempt materials, and the extent to which an inspection of the records is insufficient for the public interest or for the particular needs of the requestor. Attorney General's Public Records Manual, 2008, page 21.

The City contends that it already provides "free public access to phone numbers and emails for each City bureau on the City's website Portland Online." Ms. Taylor expressed a concern that should petitioner post the emails on his personal website, accurate and useful information would require the City to update his data base "as employees change last names, leave or retire, or become subject to an exemption/exception." This would likely incur additional costs according to Ms. Taylor.

The City notes that it "does not appear that Petitioner is asking for this information on behalf of any particular group, neighborhood association or other civic interest." No financial hardship is claimed by petitioner. Ms. Taylor asserts that the negative "potential of SPAM, phishing and junk mail" weighs against a fee waiver in the public interest.

The City has requested a 50% deposit of \$316.43 before the records search begins. It may be that the Bureaus can complete their task below the cost estimates. The City has clearly explained and justified the potential expenditure of its resources. The public interest in a fee waiver or reduction has not been established by petitioner.

ORDER

Accordingly, it is ordered that the petition of Richard Ellmyer for a waiver of fees for the production of records of the City of Portland is denied.

Very truly yours,


MICHAEL D. SCHRUNK
District Attorney