



**ROD UNDERHILL, District Attorney for Multnomah County**

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August 24, 2015

Mark Bartlett  
2747 N.E. 22<sup>nd</sup> Ave.  
Portland, OR 97212

Jenifer Johnston  
Deputy City Attorney  
Portland Office of City Attorney  
1221 S.W. 4<sup>th</sup> Ave., Suite 430  
Portland, OR 97204

Re: Petition of Mark Bartlett requesting land records of the Portland Water Bureau and Portland Parks and Recreation as retained by the Portland Auditor.

Dear Mr. Bartlett and Ms. Johnston:

In his public records petition under ORS 192.410 et seq., petitioner Mark Bartlett, requests the district attorney to order the City of Portland to provide the following records:

- 1. The past three years of real property capital asset lists for Portland Parks and Recreation (PPR) and the Portland Water Bureau (PWB).**
- 2. A list of any transfers of capital assets from either PPR or PWB to any other party whether it was called a swap, sale, or exchange.**
- 3. A detailed expenditure schedule for actual expenses with corresponding work performed by PWB for the resolution #36237.**

On June 2, 2015, Mr. Bartlett submitted a formal records request for these items to the city's auditor. Attached to its letter response the city has included copies of the documents it provided over the following month in response to each of petitioner's three requests.

As to the first category of requested records, the city provided petitioner with a five page list of PPR properties containing the name of each property, its acreage, and a short description (e.g. "Neighborhood Park," "Aquatics Facility," etc.)<sup>1</sup> The city also provided a three page list of PWB properties containing a site name and street address for each property. Petitioner acknowledges receiving these records, but believes the lists possessed by the city must contain more detailed information for these properties than what has been provided to him.

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<sup>1</sup> The documents submitted by the parties do not indicate the exact date of the city's response to this portion of the records request.

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As to the second category, on July 8, 2015 the city provided petitioner with copies of city ordinance No. 182558 and resolution No. 36976 relating to land swaps between PPR and PWB.

As to the third category, on August 6, 2015 the city provided petitioner with a one page list of capital assets at Mt. Tabor and Washington Parks including depreciation amounts and current book values. The emailed response also includes a dollar value for total operations and maintenance spending for Mt. Tabor and Washington Parks for each of the past five fiscal years. Petitioner agrees that these records were provided, but states that they are non-specific and meaningless.

Petitioner sought these records from the city's elected auditor because, he asserts, the auditor is required to maintain the records he seeks. The City Auditor, Mary Hull Caballero, personally informed petitioner, by email, "It is my understanding that my staff has provided all the records responsive to your request that we have. I cannot give you records that are not in the custody of the Auditor's Office. I have communicated to the City Attorney's Office that this matter is closed as far as the Auditor's Office is concerned."

## DISCUSSION

We have the ability to review public records cases whenever a person has been "denied the right to inspect or receive a copy of any public record." It is axiomatic that if a person has not been denied access to records then we have no basis on which to grant a petition seeking to compel access to records. For the reasons set out below we do not find that petitioner has been denied access to records under the Public Records Law.

### A. Records held by the Portland City Auditor's Office

To the extent that petitioner seeks our office to order Ms. Hull Caballero to produce records, we are statutorily barred from considering the matter. Oregon law grants jurisdiction to review the personal decision of an elected official solely to the courts. ORS 192.480; see also, *In re petition of McCullough for SE Uplift*, MCDA PRO 15-16 (2015); *In re petition of Tierney for KGW*, MCDA PRO 15-15 (2015). Here Ms. Hull Caballero personally communicated to petitioner her office's determination that the records request was fulfilled and closed. If this constitutes a "denial" under the Public Records Law then it may only be reviewed by a court. If this is not a denial, then there is no dispute for us to decide.

### B. Records held by the Portland Water Bureau or Portland Parks & Recreation

The Public Record Law does not require an agency to create new records or answer questions about its records. ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2014), p. 7. Here petitioner has made specific public records requests, outlined above. The city has provided the lists that it maintains in response. Petitioner believes that those lists should contain more information than they do and, thereby, asserts that his request has been denied. The city states that the information petitioner apparently desires is not contained in the records he requested.

As we have previously recognized, we are not empowered to compel adherence to records collection or retention laws. See, *In re petition of Shepherd for McGee*, MCDA PRO 06-

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12 (2007); *In re petition of Shepherd for Hovies*, MCDA PRO 06-10 (2007). We are empowered to order production of records actually in the possession of a public agency. ORS 192.460.

In *McGee*, cited above, we addressed a similar dispute over records that petitioner believed existed and the city claimed did not. We found that we were not in a position to resolve that dispute.

Petitioner has demanded the disclosure of materials that the City, in good faith and with due diligence, has asserted do not exist. It is perhaps surprising that no documentation was ever generated or retained [...]. However, this office is not in a position to order the disclosure of presumptively nonexistent records.

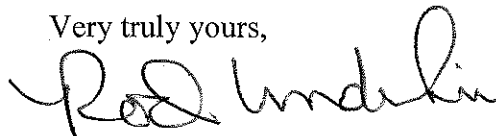
*McGee*, 06-12, p. 5

Even assuming, as petitioner asserts, that the city is required by law to maintain the precise records that he seeks, the Public Records Law only permits us to order the city to produce records that it actually maintains, that have been formally requested, and for which it has claimed an exemption.<sup>2</sup>

**ORDER**

Accordingly, the petition is denied.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

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<sup>2</sup> Because it is not relevant to resolution of this petition, we need not, and do not, express any opinion as to whether or not the city is required to retain real property records in the manner asserted by petitioner.