



ROD UNDERHILL, District Attorney for Multnomah County

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July 31, 2017

Jessica Floum
The Oregonian
1500 S.W. First Avenue, Suite 400
Portland, Oregon 97201

Jenifer Johnston
City of Portland
Office of the City Attorney
1221 S.W. Fourth Avenue, Room 430
Portland, Oregon 97204

Re: Petition of Jessica Floum, for The Oregonian, requesting records of employee earnings from the City of Portland

Dear Ms. Floum and Ms. Johnston:

Ms. Floum filed a public records petition with this office on July 17, 2017, appealing the City of Portland's denial of the release of certain employee information. This denial was made by way of email, dated June 21, 2017, where the City of Portland confirmed the following employee information was exempt under ORS 192.502(2); 1) gender, 2) race or Hispanic origin, and 3) month and year of birth. Subsequent to the June 21, 2017 email, there were more exchanges of emails prior to filing this petition.

The request for records began on April 11, 2017. Petitioner made an electronic request for the following information for every employee of the City of Portland; the actual amount paid to each person for fiscal 2015-16; the unique Employee Identification number; differentiation if an employee held more than one position during the fiscal year; start and end dates for each employee's time in each position; each employee was to be identified whether paid hourly or salaried; the Full-Time Equivalent (FTE) position; days of unpaid leave; if hourly, then actual hours worked; base pay disbursed; overtime disbursed; severance disbursed; any additional cash compensation; total cash compensation disbursed; first, middle and last name of each employee; agency job title; primary location; month and year of birth; gender; race or Hispanic origin; and union representation.¹ More than 9,000 people are employed by the City of Portland.

Petitioner made this request because, "The Oregonian/OregonLive is creating a master data base of public sector cash compensation in Oregon and SW Washington. To ensure the data are comparable across jurisdictions, we've created a common set of definitions we can apply everywhere."² Petitioner has further clarified, "The project is to examine differences in earnings based on gender, race and age. These are protected classes covered by federal civil rights

¹ This is a summary from the April 11, 2017 request, as confirmed by a system generated message time-stamped 3:01:04 PM.

² *Id.*

prohibitions on employment discrimination. No entity currently conducts such a comprehensive analysis of public bodies in Oregon.”³ The petitioner further requested that all of the information be in “a spreadsheet showing one row for each position and the person filling it.”

This request led to numerous email exchanges, phone calls and at least one face-to-face meeting between the parties. The City of Portland expressed concern for the release of some of this information, based upon the belief that certain information would be exempt under the Oregon Public Records Law. An attempt was made by both sides to narrow the request. This dialog continued after the email of June 21, 2017. The final email sent to petitioner from the City of Portland, prior to the filing of this appeal, occurred on July 14, 2017. The discussion has continued, subsequent to the filing of this petition. On July 18, 2017, Ms. Johnston raised the concern over compliance by the petitioner with ORS 192.437. The records that have been requested are currently being collected and reviewed.

The City of Portland asserts that the District Attorney does not have jurisdiction over this appeal for two reasons. First, the City of Portland has not denied the request. Secondly, the City of Portland asserts that the records requested do not exist and that the City of Portland should not be required to create them under the Oregon Public Records Law.

In the alternative, the City of Portland also argues that birthdates, race, and gender of employees is exempt from disclosure under ORS 192.502(2), that petitioner has failed to comply with ORS 192.437, and that race and gender information is also exempt under ORS 192.502(4).

DISCUSSION

There are competing interests in public records requests. Requesters are often under timeline constrictions. Agencies want to ensure that the appropriate exemptions are exerted in order to protect from disclosure information that the legislature has determined is not subject to public disclosure. While working on requests, agencies may engage in discussions with requestors about potential exemptions that may exist with regards to records. When the requested material is voluminous, this can add a perceived delay to the production of records.

ORS 192.450 provides, “[A]ny person denied the right to inspect or to receive a copy of any public record of a state agency may petition the Attorney General to review the public record to determine if it may be withheld from public inspection.” If a person is “denied the right to inspect or receive a copy of any public record of a public body other than a state agency,” ORS 192.460(1)(a) provides, “The district attorney of the county in which the public body is located...shall carry out the functions of the Attorney General.”

ORS 192.470(1) sets out the form in which a petition is to be made for the appeal. ORS 192.470(2) mandates that the Attorney General or District Attorney shall promptly notify the public body of the petition. Once a petition has been filed, the District Attorney has seven days to issue an order.⁴ Petitioner requested this appeal due to the email correspondence that purported to deny her request.

³ Excerpt from petition dated July 17, 2017.

⁴ ORS 192.465 provides, “The failure of the Attorney General or district attorney to issue an order under ORS 192.450 or 192.460 denying, granting, or denying in part and granting in part a petition to require disclosure within seven days from the day of receipt of the petition shall be treated as an order denying the petition for the purposes of

The City of Portland has argued that there are two reasons why the District Attorney does not have jurisdiction to review this appeal. The first reason is that the City of Portland has not yet denied the request of the petitioner. The City of Portland has characterized the discussion with petitioner concerning exemptions as “preliminary” and that records are still being gathered. It is understandable why a public body would want to discuss with a requestor the possibility that certain exemptions may exist. By entering into this discussion, an agency can help a requestor narrow the records search to non-exempt materials, saving both parties time and effort. From the perspective of the City of Portland, once all of the records have been collected, and the exemptions are then officially asserted, then the petitioner would have grounds to appeal.

At odds with this assertion are three emails. Two of those emails are the exchanges of June 20 and June 21, 2017. On June 20, 2017, petitioner asked the following question:

Can you please confirm that you believe the following fields are exempt from public disclosure, under ORS 192.502(2)?

- Month & year of birth (for analytical purposes)
- Gender (for analytical purposes)
- Race or Hispanic origin (for analytical purposes)

The City of Portland responded by saying, “This email is to confirm that fields listed below are exempt from public disclosure under ORS 192.502(2). I have provided the link to OregonLaws.gov that lists out all the types of public records that are exempt from disclosure <http://www.oregonlaws.org/ors/192502>.”

The third email is dated April 18, 2017. The City of Portland sent an email to petitioner, which also referenced exemptions. It is unclear from all of the other emails whether there was a continuing discussion with regards to exemptions that the City of Portland would be exerting.

In *Petition of DiLorenzo*, Att’y Gen. PRO (May 11, 2000), the Attorney General determined that jurisdiction for review of an appeal can be established prior to the disclosure of records, if it is clear that the intent of the public body is to withhold certain documents based upon Oregon Public Records Law exemptions. However, we do not need to decide if that was the case in this matter.

The City of Portland’s second argument is persuasive. At issue is the type of record that has been requested by petitioner. Each record, on its own, is certainly a public record. Exemptions may, or may not, apply. But it is the format in which those records are requested that sets this case outside the scope of Public Records Law.

According to the City of Portland, the request of the petitioner is for several data points, related to every employee of the City of Portland, to be provided in a particularized spreadsheet. The data requested comes from several different data sets. It will take approximately eighteen hours to create this record. There is no current protocol, report, or software application tool that will generate this report.

“The Public Records Law does not require public bodies to create new public records.” *Attorney General’s Public Record Manual* (2014), at page 7. “The distinction between disclosing

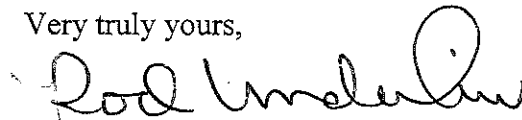
an existing record and creating a record is especially important in relation to computer-stored data. *Id.* Public bodies are not obligated to “develop or acquire new or additional software or programs in order to retrieve the requested information.” *Id.* If a public body uses a program to access information, it is obligated to use that same program to “retrieve data requested under the Public Records Law.” *Id.* at page 8. Therefore, this request by petitioner falls outside the scope of the Oregon Public Records Law, as this request is for a new record that has not yet been created. We do not have jurisdiction to consider petitioner’s request.

As we do not have jurisdiction, we will not be able to consider the merits of the exemptions claimed by the City of Portland and whether they apply. This would include ORS 192.502(2), regarding personal information, ORS 192.437, regarding the procedures for the disclosure of the contents of certain requests, and ORS 192.502(4), regarding confidential submissions.

ORDER

Accordingly, your petition is dismissed for lack of jurisdiction.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is written in a cursive style with a large, looped initial "R".

ROD UNDERHILL
District Attorney