



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

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August 3, 2017

James L. Buchal  
Chair, Multnomah County Republican Party  
P.O. Box 2241  
Portland, Oregon 97209

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

Re: Petition of James L. Buchal, Chair of the Multnomah County Republican Party, requesting records from the City of Portland relating to the Avenue of Roses Parade

Dear Mr. Buchal and Ms. Johnston:

Mr. Buchal, the Chair of the Multnomah County Republican Party, sent a letter dated May 2, 2017, to Mayor Ted Wheeler, Chief of Police Mike Marshman, and to District Attorney Rod Underhill. The letter requested:

[C]opies of any and all e-mails or other electronically transmitted or recorded communications, from April 22, 2017 to the date of your response to this request, which are related to the Avenue of Roses Parade, including but not limited to: (i) messages relating to any threats to disrupt the Parade; (ii) communications with the Parade organizers; (iii) documents relating to the April 29<sup>th</sup> events in Montavilla Park and the provision of buses therefor; and (iv) internal communications relating to the Parade by the City, the Police, or the District Attorney.

Petitioner did not receive a response from the City of Portland until June 12, 2017, when Ms. Plambeck, the Deputy Director of Communications for Mayor Wheeler, asked petitioner to “clarify recipient/sender of requested records.” On June 23, 2017, petitioner sent to Ms. Plambeck a narrowed request for the recipient/sender communications for the following people; Mayor Ted Wheeler, Commissioner Nick Fish, Commissioner Amanda Fritz, Commissioner Chloe Eudaly, Commissioner Dan Saltzman, Chief of Police Michael Marshman, Sergeant Pete Simpson, Commander Bryan Parman, Captain Dave Golliday, Maurice Henderson, Michael Cox, Michelle Plambeck, and Nathan Howard.

This office received on July 24, 2017, a letter from petitioner, dated July 19, 2017, requesting,

[T]hat the District Attorney of Multnomah County order the City of Portland and its employees to produce copies of the records requested in the last paragraph of the letter dated May 2, 2017 (attached hereto) as limited by an e-mail exchange with City employee Michelle Plambeck by e-mail of June 23, 2017 (also attached hereto).

Petitioner asserted in the same letter that, “The City’s continuing delay and inaction on this request constitutes an effective denial of the request.”

According to the City of Portland, petitioner’s letter of May 2, 2017, was received by the Mayor on May 4, 2017. Petitioner’s request to the Mayor was not in conformity with the City of Portland’s procedure for public records requests.<sup>1</sup> However, the City of Portland created a public records request for petitioner on May 18, 2017. The request was assigned to the Mayor’s Office.

After receiving petitioner’s narrowed request on June 23, 2017, it was not until July 25, 2017, that Ms. Plambeck e-mailed a fee estimate to petitioner. On that same day, petitioner requested a fee waiver or reduction of the fees associated with his request. Petitioner wrote that the reason a fee waiver should be granted was because, “The problem of criminal threats arising from Antifa is of considerable concern to all citizens of Portland, and it is in the public interest that the criminal conduct of this group be fully exposed to the public.”

On July 26, 2017, the City of Portland requested further information from petitioner to support his request for a fee waiver. Petitioner provided further information to the City of Portland on July 31, 2017, which is still under consideration. The City of Portland states that it “is ready to continue processing this request.” As of July 31, 2017, petitioner had not yet paid the 50 percent deposit to begin the process.

The City of Portland asserts that the district attorney does not have jurisdiction to review this petition for two reasons; 1) The district attorney lacks jurisdiction to review the Mayor’s estimated fees or any records in the control of an elected official, and 2) the City is still processing this request.

## DISCUSSION

### A. Elected Officials – ORS 192.480

The district attorney is ordinarily empowered to resolve public records disputes. ORS 192.410 et seq. “However, where an elected official claims the right to withhold disclosure of public records, jurisdiction to hear any challenge to that decision lies exclusively with the circuit court.” *Petition of Bethany Barnes*, MCDA PRO 17-30 (June 1, 2017). ORS 192.480. See also, *Petition of Bethany Barnes*, MCDA PRO 17-14 (Feb. 23, 2017). “If the elected official orders nondisclosure even after a petition for review has been filed with the [...] district attorney, the reviewing officer is deprived of jurisdiction and the petitioner’s recourse is to the court only.” *Attorney General’s Public Records Manual* (2014), page 125.

At this time, there is nothing to examine with regard to this exemption since, “[T]he Mayor has not made a decision to withhold records but instead has provided an estimate of the cost to provide the requested records.”<sup>2</sup>

The City of Portland has asserted that the district attorney cannot review the fee, or denial of a waiver of that fee, if the decision is made by the elected official or his designee. This

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<sup>1</sup> The procedure is available at <http://portlandoregon.gov/citycode/article/185804> and is codified at ADM-8.03.

<sup>2</sup> The City of Portland’s Response (July 31, 2017).

question is not properly before us at this time, since the Mayor is still considering whether to waive the fee and because petitioner has not yet paid his deposit.

B. Constructive Denial

The district attorney only has jurisdiction to order a public agency to produce records when there has been a denial of a records request. A records request may be “constructively” denied if the delay is too great. *Petition of Willamette Week*, MCDA PRO 16-25 (October 24, 2016). There has been delay in this matter, but we need not consider at this time whether the nearly three-month delay constitutes constructive denial. *Petition of Jason Wright*, MCDA PRO 16-29 (Nov. 16, 2016). As of July 25, 2017, petitioner has been quoted a cost estimate and the City of Portland is prepared to go forward with the search for responsive records. Once an agency quotes a fee, it is not required to perform work until the fee is received. *Manual* (2014), page 17.

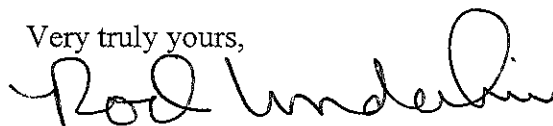
With regards to petitioner’s request for a fee waiver or a fee reduction, it is currently under consideration. No final decision has been made with regards to the fee waiver.

We lack jurisdiction at this time because the City of Portland is prepared to proceed with the public records request, once the deposit is paid by petitioner.

**ORDER**

Accordingly, your petition is denied for lack of jurisdiction.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon