



ROD UNDERHILL, District Attorney for Multnomah County

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August 21, 2017

Nicholas Sullivan
6027 S.W. 47th Avenue
Portland, Oregon 97221

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

Re: Petition of Nicholas Sullivan, requesting a fee reduction for non-exempt public records regarding Safe Routes to School

Dear Mr. Sullivan and Ms. Johnston:

In his public records petition, dated August 4, 2017, petitioner Nicholas Sullivan appeals Portland City Commissioner Saltzman's denial of a fee reduction, as follows:

The request was sent back...with an estimated cost of \$3,046.90. I then requested a fee reduction in that I believed the request was in the public interest to help determine how an error to the safe route to school map in the Hayhurst Neighborhood Association was published to the Portland website and on how the city is discussing and making changes to safe routes to school...The City Commissioner's Office for Dan Saltzman denied my appeal [for a fee waiver].

There are a series of emails that detail the conversation between petitioner and the Commissioner's Office. On July 13, 2017, petitioner requested:

[A]ny non-exempt public records regarding either Hayhurst, Safe Routes to School, Safe Route to School, Hayhurst Neighborhood Association, Janet Hawkins, Randi Sachs, or Brynna Hurwitz, Everett homes, Vic Remmers, Remmers. The dates I'm looking for are from May 1st to July 13th.

Stacy Brewster, the Constituent Communications and Media Manager in Commissioner Dan Saltzman's Office, emailed petitioner on July 14, 2017, to discuss reducing the costs of petitioner's request by clarifying the particular records petitioner was requesting. On July 14, 2017, petitioner increased the search range to include January 1, 2017, to July 13, 2017. On July 18, 2017, the search terms for emails was narrowed to eight search terms. On July 25, 2017, petitioner was provided a written fee estimate of \$3,046.90 for the records search and described the process by which to begin the search, which included the expanded date range. Petitioner then requested a fee waiver or a reduction of fees.

Petitioner described in subsequent emails that a fee waiver or reduction should be granted as this request was in the public interest. The Commissioner's Office communicated with petitioner as to the various factors that should be addressed in requesting the fee waiver, which included; "1) How do you or your organization intend to use the information? 2) How will the information benefit the wider public? and 3) How do you or your organization intend to

disseminate the information to the wider public?” Stacy Brewster also informed the petitioner that part of the balancing test would include the volume of records requested.

Petitioner stated that he believed “communications related to safe routes to school as well as the error that was made that uploaded an incorrect map for the Hayhurst School route are in the public interest.” Petitioner stated that he would share this information with local neighborhood associations and news agencies, as a story had already been reported by KATU. Petitioner indicated that it was important to know how errors occurred.

On August 4, 2017, Stacy Brewster responded:

Even assuming you could present information to show a sufficient public interest, the public interest only represents part of the waiver analysis. The final part of the fee waiver analysis evaluates the burden on the City. For this request, the burden on Commission Saltzman’s Office weighs against a waiver.

The City of Portland contends that the District Attorney does not have jurisdiction to review Commissioner Saltzman’s denial of a fee waiver.

DISCUSSION

A. Elected Officials – ORS 192.480

The district attorney is ordinarily empowered to resolve public records disputes. ORS 192.410 et seq. Under ORS 192.440(5) and (6), the district attorney may review whether a public agency has acted unreasonably in either denying a waiver, or reduction, of fees. There is a multi-part test to determine reasonableness. The analysis includes: “a) whether a waiver is prohibited by law, b) whether the ‘public interest’ test is met, and c) whether the agency’s decision was ‘unreasonable.’” *Petition of Ashy*, Att’y Gen. PRO, (Aug. 7, 2007).

“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. There has not been a denial of the request for records.

Rather, this appeal deals solely with the issue of a request for a fee waiver. This office has previously addressed the circumstance where an elected official declines to waive or reduce a fee associated with a public record request:

ORS 192.480 provides that the District Attorney may not consider a petition to review a denial of a public records request either 1) when the records at issue are in the custody of an elected official, or 2) the records at issue are in the custody of any other person and the elected official claims the rights to withhold disclosure. Likewise, this office may not consider a denial of a request for a fee waiver as to records in those same circumstances.

In re Petition of Tierney, MCDA PRO 15-15 (June 17, 2015). Petitioner’s appeal is based upon the denial of a waiver, or reduction, of the fee. The City of Portland asserts in its response, “Commissioner Saltzman has declined to waive the fee for the burdensome public records

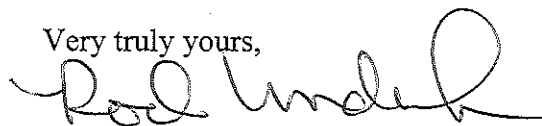
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request.” As an elected official has asserted the right to deny the fee waiver, the District Attorney does not have jurisdiction to determine whether the Commissioner acted unreasonably.

ORDER

Accordingly, your petition is denied for lack of jurisdiction.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is fluid and cursive, with a large loop at the end.

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

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