



ROD UNDERHILL, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

May 31, 2018

Gordon Friedman
The Oregonian
1500 S.W. First Avenue, Suite 400
Portland, Oregon 97201

Derily Bechthold
Deputy City Attorney
Portland City Attorney's Office
1221 S.W. Fourth Avenue, Suite 430
Portland, Oregon 97204

Re: Petition of Gordon Friedman, on behalf of The Oregonian, seeking a determination of undue delay under ORS 192.407

Dear Mr. Friedman and Ms. Bechthold:

In his public records appeal, dated May 21, 2018, petitioner Gordon Friedman asked this office to order the City of Portland to release records pursuant to a public records request made on March 26, 2018. Petitioner had requested documents from the Bureau of Human Resources (BHR) pertaining to a "strike meeting" attended by BHR Director Serilda Summers-McGee and Bryant Enge.

BHR acknowledged receipt of petitioner's request on March 26, 2018. On April 9, 2018 BHR indicated in a form response that it might be the custodian of responsive records and quoted \$69.78 to search for and produce any responsive records. Petitioner followed up with questions about the calculation of the fee. On April 10, BHR provided an itemized breakdown of the fee, but no answer to other portions of the question regarding the extent of expected redactions. On May 4, 2018 petitioner requested a fee waiver. Having received no response to his fee waiver request, petitioner filed this appeal on May 21, 2018.

On May 23, 2018, Deputy City Attorney Derily Bechthold informed us that she had responded to petitioner's underlying request by stating that neither of the two involved city employees believed there were any responsive documents, proposing an additional email search that could be done if desired, and waiving any fees associated with the request.¹

For the reasons discussed below, we deny the petition at this time, however the city must make a quick additional response to petitioner in order to remain in compliance with the timeline set out in ORS 192.329.

¹ Petitioner additionally challenges the accuracy of the reported response that Ms. Summers-McGee and Mr. Enge did not possess any responsive records. We have repeatedly recognized that we do not have the practical ability to assess an agency's assertion that it is not the custodian of a requested record. See, e.g., *Petition of Shepherd for McGee*, MCDA PRO 06-12 (2007).

DISCUSSION

ORS 192.324(2) provides, in relevant part,

[...] the public body shall within five business days after receiving the [public records] request acknowledge receipt of the request or complete the public body's response to the request.

ORS 192.329(5) provides that,

As soon as reasonably possible but not later than 10 business days after the date by which a public body is required to acknowledge receipt of the request under ORS 192.324, a public body shall:

- (a) Complete its response to the public records request; or
- (b) Provide a written statement that the public body is still processing the request and a reasonable estimated date by which the public body expects to complete its response based on the information currently available.

ORS 192.329(3)(a) provides that,

If a public body has informed a requester of a fee permitted under ORS 192.324(4), the obligation of the public body to complete its response to the request is suspended until the requester has paid the fee, the fee has been waived by the public body pursuant to ORS 192.324(5) or the fee otherwise has been ordered waived.

Reading all of these statutes together, a public body is required to fulfill a public records request, or provide a written statement under 192.329(5)(b), within 15 business days of receiving the request.² However, any time between when the agency quotes a fee and when that fee is resolved (i.e. paid, waived, or ordered waived) does not count against those 15 days. ORS 192.329(3)(a).

In this case, Mr. Friedman made his request on March 26, 2018. BHR quoted a fee on the tenth business day after the request, April 9. On May 4, Mr. Friedman requested a waiver of that fee. BHR took 13 business days before granting that waiver on May 23.³

We understand petitioner's frustration with emails and queries that went unanswered, at times for weeks. However, as the situation currently stands the request is back on track, fees have been waived, and an initial canvas indicates that there are no responsive records. Ms. Bechthold, on behalf of BHR, has informed us that the proposed email search could be

² Fifteen days is the limit because the response must be made ten days after the date the body is required to acknowledge the request (ORS 192.329(5)), which is five days after receiving it (ORS 192.324(2)).

³ Since the fee waiver has been granted, any argument about undue delay as to the waiver decision is moot, and ORS 192.329(3)(a) provides that this time does not count against the time to respond to the underlying request.

performed rapidly at this point and her review of any produced documents would take less than a day (again, based on her research she believes there will be no responsive documents).

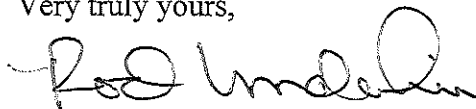
Not counting the time between the fee quote and the grant of fee waiver, as ORS 192.329(3)(a) requires, today is either the tenth or fifteenth day the underlying records request has been pending.⁴ We of course recognize that this request has actually been outstanding for over two months on the calendar, however this does not alter the statutory analysis.

ORDER

Accordingly, the petition is denied at this time. This determination is made with the understanding that, having granted the requested fee waiver, and resolved this pending appeal, BHR is now “back on the clock” with respect to its duty to respond to the records request without undue delay. BHR has already used up most of the days specified in ORS 192.329(5).

Ms. Bechthold’s response to petitioner on May 23, 2018 is a written statement that the public body is still processing the request, but does not contain “a reasonable estimated date by which the public body expects to complete its response based on the information currently available.” ORS 192.329(5)(b). To be in compliance with ORS 192.329(5), BHR must either provide the results of the email search or a written statement that fully complies with (b) of that section within the timeline outlined above.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

18-19

⁴ There is no guidance in the statute as to whether the time between the filing of a public records appeal with the district attorney and the district attorney’s issuance of an order counts against the 15 day timeline or not but, either way, BHR has not yet exceeded the 15 day deadline.