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July 11, 2018

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Portland, Oregon 97205

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

Re: Petition of Alan Kessler seeking access to certain emails of Wendy Chung

Dear Mr. Kessler and Ms. Johnston:

In his public records appeal, dated June 25, 2018, petitioner Alan Kessler, asks this office to order the City of Portland to disclose:

> **copies of any and all emails received by Historic Landmarks Commissioner Wendy Chung (wendy.chung@yahoo.com and/or wcrossiter@yahoo.com); dated between 2/1/2018 and 5/30/2018; containing the case-insensitive string "PCHR"; and which had not been forwarded by Commissioner Chung to any @portlandoregon.gov email address prior to 5/30/2018 at 12:01PM (PDT)**

Ms. Chung is a member of the City of Portland's Historic Landmarks Commission. The Portland Coalition for Historic Resources (PCHR) is an organization described by petitioner as "an advocacy group that supports legislation to strengthen historic resources protections in the City." Petitioner believes that Ms. Chung receives email communications from PCHR and asserts that any such emails are public records if relevant to her public business as a member of the Historic Landmarks Commission.

Ms. Chung is a volunteer and does not maintain an official @portlandoregon.gov email address. Rather, to comply with the public records obligations that come with her service as a public official, the city states that Ms. Chung copies one of four identified City of Portland employees on any emails relating to the conduct of commission business.

An earlier records request, not at issue here, addressed email communications that were copied to one of the four city employees. This appeal address only those communications that exist exclusively in Ms. Chung's non-city email accounts.

Petitioner submitted the request underlying this appeal on May 30, 2018. On June 25, 2018, shortly after petitioner filed this appeal, the city responded to him with an initial quote of $400. This fee would cover having a third-party contractor download emails from Ms. Chung's

yahoo.com email accounts, perform the requested search, and provide the emails that meet the search criteria to the city for further review. Subsequent to issuing this this estimate, Ms. Chung withdrew her consent to have her personal email account searched and has, instead, submitted a declaration in which she states that she has conducted the requested searches on her own account and has located no public records.

Petitioner challenges the city's response in two regards. First, he argues that the city exceeded the permissible response time of 15 business days, and so should be ordered to immediately release the records. Second, he asserts that the $400 fee estimate is unreasonable and requests that we order it reduced. Any issue surrounding the fee is now moot, because the city is not offering to do additional work on this case for any fee.

In sum, the city has denied petitioner's public records request because it exceeded the permissible time to respond and, on the merits, asserts it has no responsive documents. The city's completion of its response to the request moots any issue as to timeliness. On the merits, for the reasons discussed below, the petition is denied.

DISCUSSION

A. Timeliness of response – ORS 192.329(5)

The violation of the timeliness requirement in this case is conceded. The city did not respond to petitioner's request until the 18th business day after he submitted it, which is in excess of the 15 days permitted by ORS 192.329. The city's concession is well-taken and we proceed without further discussion to what remedial order, if any, is authorized and appropriate here.

In timeliness cases, such as this, the legislature has not authorized the district attorney to order "all" records released sight unseen. ORS 192.407(3) provides that, if we find a violation of the timeliness requirements of ORS 192.329(5), we have the authority to order "nonexempt material responsive to the request" released.

It follows then that the failure of an agency to timely respond to a request does not forfeit the agency's ability to assert that the records at issue are exempt from disclosure (or indeed are not public records subject to disclosure in the first place.)

The effect of the enactment of ORS 192.407 last year was to afford this office the jurisdiction to decide appeals before an agency had expressly denied a request. The district attorney previously lacked this authority in all but the most egregious of circumstances. See, *Petition of Monahan for Willamette Week*, MCDA PRO 16-25 (2016). This has the practical effect of expediting agency responses to requests that are subject to unexcused delay, which appears to be exactly what happened here.

Because the city has now actually completed its response to petitioner's request, any remedial order we could issue under ORS 192.407(3) would be moot. Accordingly, we proceed to address that response on the merits.

B. City access to a public official's personal email accounts

Petitioner's primary point of contention in this appeal is that the city has deferred to Ms. Chung's determination as to what is and is not a public record without performing its own search or analysis. The city maintains that it cannot compel Ms. Chung to provide unfettered access to her private accounts for purposes of confirming her compliance with the public records law. Rather, the city states that Ms. Chung has performed the requested search and reports that there are no public records responsive to the request. The Oregon public records law, and the body of opinions interpreting it, do not address how to allocate the responsibility of responding to a public records request under these circumstances.

It is clear that a public record is not shielded from disclosure, or made not a public record, as a result of its location among the personal records of a public official. It is equally true that an individual's service as a public official does not eliminate any expectation of privacy against governmental intrusion into her personal papers or emails that she would otherwise enjoy as a private citizen. *Grand Jury Subpoena v. Kitzhaber*, 828 F.3d 1083, 1091 (2016). But, *Kitzhaber* also held that a public official has no reasonable expectation of privacy in public records, even if those records are comingled with personal email. *Id.* See also, *Petition of Hinkle*, Att'y Gen. PRO (2/12/2015).

This office's ability to require public records be produced to us for review derives solely from ORS 192.422(2), which provides in relevant part that "the public body shall [...] transmit the public record disclosure of which is sought, or a copy, to the [district attorney], together with a statement of its reasons for believing that the public record shall not be disclosed." This section does not grant this office the authority to demand an individual public official produce records that she asserts are personal records in order to confirm that assertion; it applies only to "public records" and does not purport to require production of records the character of which is disputed.[1] To construe this section otherwise would risk running afoul of Article I, section 9 of the Oregon constitution in factual situations such as the one presented in this appeal.

In similar cases from other jurisdictions, courts have approved placing the onus of sorting public records from private records on the affected public official. See, *Nissen v. Pierce County*, 183 Wn.2d 863, 884-85 (2015) ("Of course, the public's statutory right to public records does not extinguish an individual's constitutional rights in private information. But we do not read the [Washington State Public Records Act (PRA)] as a zero-sum choice between personal liberty and government accountability. Instead, we turn to well-settled principles of public disclosure law and hold that an employee's good-faith search for public records on his or her personal device can satisfy an agency's obligations under the PRA.")

Federal courts applying the Freedom of Information Act (FOIA) have reached similar conclusions. See, e.g., *Media Research Ctr. v. U.S. Dep't of Justice*, 818 F. Supp. 2d 131, 139-40

[1] We disagree with petitioner's assertion that the public records law implicitly grants this office administrative subpoena power to compel production of records. We likewise reject the assertion that we could obtain a search warrant to access the records. Our role in a public records context is adjudicatory, not investigative. ORS 192.415.

(D.D.C. 2011) (under FOIA, declarations sufficient to determine e-mails were not sent in employee's official capacity). As the Fourth Circuit has held, "an agency cannot require an employee to produce and submit for review a purely personal document when responding to a FOIA request." *Ethyl Corp. v. United States EPA*, 25 F.3d 1241, 1247 (1994).

Oregon's public records law was modeled in large part on FOIA and, where gaps exist in construing our public records law, reference may be made to cases interpreting FOIA as persuasive authority. *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451 (1994) ("we believe that the Oregon legislature would have intended the Oregon law to be applied in a manner consistent with the application of those statutes, like the FOIA, upon which the Oregon law was modeled"). In the absence of clear direction from the Oregon legislature or an Oregon court, we adopt the standard articulated above as the most likely applicable to the Oregon public records law: a public official's good-faith search for public records on her private equipment can presumptively satisfy her obligation to produce public records.

In this case, the city has submitted a declaration from Ms. Chung in which she states that she has complied with the city policy requiring that all emails relating to the conduct of her public duties be forwarded to a city email account for retention. Nonetheless, she states that she has conducted the search requested by petitioner and located no additional public records.

Petitioner has cited *Petition of Hinkle*, Att'y Gen. PRO (2/12/2015), in which the Attorney General ordered emails from former first lady Cylvia Hayes released under the public records law, in support of his petition. *Hinkle* concluded that Ms. Hayes was a "public body" subject to the public records law, and that all of the emails in her personal email account that related to the conduct of the public's business were public records subject to disclosure. These points are not contested by the city here. All agree that Ms. Chung is subject to the public records law. And all agree that her emails that relate to the conduct of the public's business are subject to disclosure. The present dispute is as to who gets to make the determination that a particular email or category of emails are or are not public records. This is not an issue that *Hinkle* had to resolve.

In the judicial proceedings subsequent to the *Hinkle* order, the court ordered Ms. Hayes to turn over a quantity of her personal email for *in camera* inspection to resolve the question of whether or not they were public records. While a court may have the authority to do that, we lack any inherent judicial authority and may exercise only those powers expressly granted to us by statute.

This office has regularly held that where a public body asserts that it does not possess any public records responsive to a request we are not equipped or empowered to evaluate that determination. See, e.g., *Petition of Monahan,* MCDA PRO 16-25 (2016) at n.4 ("this office is not legally or practically in a position to challenge an agency's claim that it has, in fact, provided all the records it has that are responsive to a request").

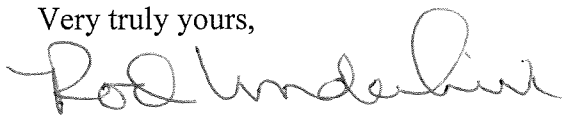
We recognize our order today does not resolve the key dispute between the parties, specifically, whether or not emails sent by or about PHRC to Ms. Chung's personal email account (if any) constitute public records subject to disclosure. It is well-settled, as in *Hinkle,* that any public records relating to the public's business must be disclosed. Here, the city asserts

it has already done this, and this assertion is supported by Ms. Chung's declaration. A response that the public body is not the custodian of any responsive public records is a permissible response to a records request. ORS 192.3329(2)(d). In this posture, the petition is moot as to the issues we have authority to decide.

ORDER

Accordingly, the petition is denied in part as moot, and denied in part for lack of jurisdiction.

Very truly yours,



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