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September 7, 2018

Paul Terdal
700 N.W. Macleay Blvd.
Portland, Oregon 97201

Mary Kane
Portland Public Schools
501 N. Dixon Street
Portland, Oregon 97227

Re: Petition of Paul Terdal seeking access to records relating to special education services and fee waivers as to the same

Dear Mr. Terdal and Ms. Kane:

In his public records appeal, dated August 15, 2018, petitioner Paul Terdal asks this office to review the responses made to date by Portland Public Schools (PPS) to a substantial public records request he made on September 17, 2017. Mr. Terdal's request, very generally, was for training materials, correspondence, contracts, and procedures relating to the provision of services to autistic students within PPS.

It is readily apparent from the materials submitted that Mr. Terdal has an intense interest in the issue of provision of special education services to autistic students. Mr. Terdal's thorough and well-supported submission to this office includes declarations attesting to an interest in this topic beyond Mr. Terdal's personal interactions with PPS.

Because the scope of the initial request is relevant to the questions in dispute, below is reproduced Mr. Terdal's entire records request, renumbered for ease of reference:

1. All documents related to "Procedures when Parents Request Private ABA Providers to Access School" created, revised, or distributed from January 1, 2017 to the present, including:
 - a. Current and previous versions of "Procedures when Parents Request Private ABA Providers to Access School" and any associated forms, such as "Parent Consent for Private ABA Provider to Access School Program"
 - b. All written or electronic correspondence regarding these procedures, from January 1, 2017 to the present, including e-mail messages sent or received by any of the following individuals that reference this policy, or the terms "ABA", "Applied Behavior Analysis" or "Applied Behavioral Analysis" in subject, body, or attachment: [18 names omitted]
2. Contracts with outside vendors or consultants, for any special education or related services provided by the District or for external placements outside the District, that were initiated or renewed from January 1, 2014 to the present; examples include but are not limited to:

- a. Contracts with Building Bridges, Victory Academy, or any other external educator or provider of special education or related services
 - b. Contracts with any outside provider to provide special education or related services, such as Dr. Maria Gilmour BCBA-D of Wynne Solutions, LLC, or any other outside provider
3. Any current reports or documentation describing special education and related services provided by the District to students with autism
 4. Training or communications materials developed, distributed, or used from January 1, 2017 to the present to train or communicate policy or procedures for development of an IEP, including conduct of an IEP meeting, use of computer systems related to IEPs, or documentation of the “service summary” section with notations on Specially Designed Instruction; Related Services; Supplementary Aids/Services; Modifications; Accommodations; and Supports for School Personnel

PPS broadly determined that there was a general public interest in its policies and procedures relating to autistic students and has, accordingly, provided a substantial quantity of documents to Mr. Terdal at no cost. As to other documents, PPS determined that they relate to a more limited question of personal interest to Mr. Terdal and a few similarly situated parents and do not meet the public interest test.

PPS states that as of August 24, 2018 it has provided over 1,000 pages of documents to Mr. Terdal. According to its accounting, PPS has already waived or not assessed costs for over 100 hours of time processing and responding to this request. To date, Mr. Terdal has paid \$327 in fees and PPS has quoted a total of \$1,776.90 to process the balance of the request. The primary dispute remaining between the parties is whether or not PPS should be required to waive the balance of the outstanding fees.¹

Mr. Terdal additionally asserts that as to certain documents he has received, he has reason to believe that he has not received the most recent version. PPS denies this is the case.

As of today any issues relating to the length of time it has taken PPS to respond to this request are now moot. PPS has either completed its response by provision of records or suspended its obligation to do so by preparing a fee estimate as to each item in the request. ORS 192.329(2) – (3).

For the reasons discussed below, we conclude that PPS has not abused its discretion in denying a full fee waiver to Mr. Terdal.

Certain additional disputes exist as to the particular documents or particular fees that we address individually in section B below.

¹ Petitioner also asserts, based on declarations regarding statements made by former PPS employees, that the fees in this case are impermissible because they were assessed not to recover costs but rather to constructively deny him access to the records. Whatever Mr. Terdal may have been told in 2015 by former PPS employees, a review of the actions taken by the current PPS administration in responding to this request does not support that conclusion today.

DISCUSSION

A. Fee Waiver – ORS 192.324(5)

ORS 192.324(5) provides that,

The custodian of a public record may furnish copies without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public.

The fee waiver statute sets out a two-step analysis. First, the public body must determine if access to the record would primarily benefit the general public. If yes, then the body may elect to waive its fees. *Petition of Brosseau*, MCDA PRO 17-21 (2017). The Attorney General has advised that in exercising its discretion on the second step an agency should consider “(1) the character of the public interest in the particular disclosure, (2) the extent to which the fee impedes the public interest, and (3) the extent to which a waiver would burden the public body.” PUBLIC RECORDS AND MEETINGS MANUAL (2014) at 23.

In reviewing an agency’s decision to deny a fee waiver, the district attorney may only determine whether or not the agency acted within the permissible bounds of discretion; we may not substitute our judgment for that of the agency. ORS 192.324(6).

PPS has determined that, as to many of the responsive documents, there is a public interest and, despite the substantial amount of work involved, that interest is sufficient to justify waiving their fees entirely. PPS has written off over 100 hours of its time to date and released over 1,000 pages of documents. PPS has declined to waive its fees in whole as to items 1.a, 1.b, and 2. Petitioner asks us to order that fee waived due to the public interest in these issues.

In making these decisions, PPS broadly sorted the subparts of petitioner’s request into two categories 1) documents of general interest to evaluate PPS’ approach to autistic students; 2) documents of particular interest to the 20 families, including petitioner’s, within PPS who were affected by a rule change that now prohibits private therapists from working with autistic students in the classroom.² As to the documents in the first category, PPS determined that the public interest supported a fee waiver. As to the second, it determined that release would not primarily benefit the general public, would require substantial labor to produce, and declined to waive its fee. Documents in this category included the 3,764 emails responsive to 1.b., each of which would have to be analyzed for student-specific information, the disclosure of which is prohibited. A few documents, such as the contracts requested in item 2, fit the “general interest” category but did not receive fee waivers because they required labor disproportionate to their perceived utility.

We have carefully reviewed petitioner’s submissions and we cannot say that PPS’ decision to deny the blanket fee waiver was unreasonable. We need not decide if PPS was correct in its determination that certain of these documents were of limited or personal interest because, even if they were not, PPS is still permitted to balance their utility against the burden in providing them. PPS has already released a large quantity of documents of public interest at little

² Petitioner is one of two affected parents who pursued litigation challenging this rule change.

or no cost to requestor. It may well be true that the release of additional documents would incrementally increase the interested public's understanding of the issue, but, in the context of the large quantity of information already released, PPS's fee waiver decision in this case was within the range of legally permissible options.

B. Specific Areas of Dispute

Apart from the broad fee waiver issue, there remain a handful of specific disagreements about particular documents or categories of documents. These are addressed below under the numbering of the original request.

1. *All documents related to "Procedures when Parents Request Private ABA Providers to Access School" created, revised, or distributed from January 1, 2017 to the present*

Petitioner's request identifies two specific categories of documents he wished produced in this category, but the request additionally encompasses "all documents related to" and not just the two specific categories he called out. His petition asserts that PPS has not adequately responded to this item because it has ignored the umbrella category. In the course of this appeal PPS has clarified that it does not possess any responsive records to the umbrella category other than those addressed separately in subparts (a) and (b) of this item.

Petitioner does not articulate any reason to believe that PPS' determination is in error, rather he disputes the lack of specific information to this item. PPS' response resolves this issue.

- 1.a. *Current and previous versions of "Procedures when Parents Request Private ABA Providers to Access School" and any associated forms, such as "Parent Consent for Private ABA Provider to Access School Program"*

PPS has provided Mr. Terdal with two responsive documents at no charge and estimated that it will take 10 hours of its time, at a cost of \$450, to complete its response to this item. Those 10 hours relate to providing "previous versions" of the document "Procedures when Parents Request Private ABA Providers to Access School."

The "Procedures" document is maintained by PPS as a Google Document. Like other word processing systems, Google Documents records a version history that tracks edits made to the document over time. As such, PPS does not possess any "previous versions" of the document. There is one version, the most recent, that within it exists a record of all edits applied over time. The problem, from a public records standpoint, is that only individuals who have permission to edit the original document are capable of viewing the history of changes applied to the document. This is a limitation of the software environment and not an elective restriction imposed by PPS. PPS has the capacity, and has expressed a willingness, to review the edit history and reverse engineer discrete versions of the document that reflect major milestone changes. But this will be laborious and time consuming, hence the 10 hour estimate to create records that do not currently exist.

Where it is clear that a fee is not assessed merely as a pretext to deny access, this office lacks the authority to determine whether or not a fee truly represents an agency's actual costs.

Petition of Babcock, MCDA PRO 15-22 (2015). We are persuaded that the cost in this case is not pre-textual, and that ends our analysis.

Petitioner also disputes that he has received the most recent versions of two documents that PPS did provide to him. As to one document the file he received was "17-18 ABA Provider Guidelines-2.docx"; Petitioner states that he has separately seen a copy of this file with a "-4" suffix, which leads him to believe that the "-2" is not the most recent version. Likewise, he received a file "2015 GuildelinesContract for Private ABA Therapists in PPS Schools.docx" that contained a footer with the date "2/20/15." Petitioner states he has separately seen a copy of this document with a footer date of "6/12/15," which again leads him to believe that there are newer versions that have not been sent to him.

Much of the confusion, again, may result from PPS' use of Google Documents to edit and manage the relevant records. As to each of these documents, provided to petitioner in ".docx" format, the true original exists in the cloud as a Google Document. Any user with appropriate access is capable of saving a snapshot of the Google Document in a number of formats, including the Microsoft Word format used here. As copies of a document are incrementally saved, some computer operating systems successively number them, e.g., "document.docx," "document-1.docx," "document-2.docx," etc. That one particular user had saved three prior snapshots of a document would result in a "-4" suffix that has no temporal relationship to the "-2" suffixed version of the same document saved by a different user. Likewise, these documents frequently contain date "fields" that will automatically populate with the date a document was printed or saved into a different format rather than the date on which the document was created. In all cases the prime version of the record is the original Google Document, of which PPS states the ".docx" version provided to petitioner is a true copy.

In sum, PPS states it has not denied petitioner's request for the most recent version of these two records because it has actually provided them to him. It believes that any asynchronous dates or iterative numbering are artifacts of using a fluid multi-user cloud-based system that, whatever its other benefits, is simply not capable of static version tracking.

3. *Any current reports or documentation describing special education and related services provided by the District to students with autism*

In response to this item PPS provided petitioner with a document entitled "Communication Behavior Classroom Manual." Petitioner acknowledges this, and agrees it is a responsive document, but asserts a belief that PPS must have additional reports responsive to this item given the multi-million dollar budget devoted to special education within PPS.

PPS has repeatedly asserted since at least 2016 in communications to Mr. Terdal that no additional reports exist. PPS maintains that position in its submission to this office. On the one hand Mr. Terdal asserts that these documents *should* exist as a matter of reason; on the other PPS adamantly denies that they do. This is not a dispute that we are practically empowered to resolve. 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").

4. *Training or communications materials developed, distributed, or used from January 1, 2017 to the present to train or communicate policy or procedures for development*

of an IEP, including conduct of an IEP meeting, use of computer systems related to IEPs [...]

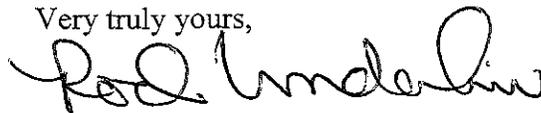
Petitioner disputes that PPS has fully responded to this item because it has not provided him with user manuals for its Synergy software that it uses to track student records. Synergy is used to track student grading and similar records throughout the PPS system. Certainly, information relating to a special education student's Individualized Education Program (IEP) could be contained in Synergy. The original request for training materials relating to the "use of computer systems related to IEPs" cannot be fairly said to encompass a user manual, if one exists, for Synergy. True, Synergy records information about IEPs, but to read the request broadly would require user manuals for Microsoft Word or PowerPoint on the grounds that those programs are sometimes used in contexts related to IEPs.

However, petitioner points out that on December 7, 2017 he clarified this item to include any user manual for "the computer system that PPS uses to document IEPs." Synergy is undeniably the system used to document IEPs (among many other things). PPS tells us that it informed its special education department of this particular request and received no response. PPS cannot, at this time, confirm or deny whether this manual exists. We recognized that this was a substantial, multi-pronged, and evolving records request, however silence on a particular portion of a request is not a permitted response in ORS 192.329. As it has been longer than 15 business days since the clarified request was made, the request for the Synergy user manual has been denied.³

ORDER

Accordingly, the petition is denied, except that, pursuant to ORS 192.407, PPS shall provide a copy of any non-exempt portions of the Synergy user manual, or a clear statement that it does not possess one, to petitioner within seven business days of this order. This disclosure is subject to the payment of fees, if any, not to exceed PPS' actual cost in producing the records.

Very truly yours,



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Multnomah County, Oregon

Notice to Public Agency

Pursuant to ORS 192.411, 192.415, and 192.431(3) your agency may become liable to pay petitioner's attorney's fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within seven days formal notice of your intent to initiate

³ That a public body purchases software or copyright protected literature for its own use does not inherently make it subject to release under the public records law. A user manual for Synergy may or may not exist, and may or may not be exempt from disclosure, but PPS must determine this and respond accordingly to petitioner.

Page 7
September 7, 2018
Petition of Paul Terdal

court action to contest this order, or fail to file such court action within seven additional days thereafter.

18-34