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September 7, 2018

James Buchal
Murphy & Buchal LLP
3425 S.E. Yamhill Street, Suite 100
Portland, Oregon 97214

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

Re: Petition of James Buchal requesting a determination of undue delay pursuant to ORS 192.407

Dear Mr. Buchal and Ms. Kane:

In his public records appeal, dated August 23, 2018, petitioner James Buchal asks this office to order Portland Public Schools (PPS) to complete its response to his request in a timely fashion.

This appeal relates to the same underlying request we addressed on June 7, 2018. *Petition of Buchal*, MCDA PRO 18-18 (2018). The records request generally encompasses emails and other materials relating to PPS' involvement in supporting or facilitating student protests of gun violence. In that prior order petitioner sought a fee waiver for the 190 hours of work PPS estimated would be required to review the over 17,200 emails that were responsive to the agreed upon search terms.¹ We denied the petition. Petitioner subsequently paid the estimated costs of \$8,552 on July 6, 2018.

After receiving this payment, PPS estimated that it would take 30-60 days to accomplish the 190 hours of work contemplated in the estimate. On July 19, 2018, PPS provided a first batch of records. Petitioner has reviewed those records and believes they are non-responsive to his initial request.

When he inquired of PPS as to the continued delay, PPS' public records officer replied that the public records workload at PPS had continued to be heavier than expected over the summer and it would likely take "several months" to complete review of every item from petitioner's request.

¹ During the course of this appeal concern was raised by PPS that there might actually more than twice as many emails that are actually responsive to this request. There are any number of steps PPS and petitioner could take to address this concern moving forward, but our order today addresses only the 17,200 emails and related documents that were the subject of the July 6, 2018 fee payment.

Having received no further batches of records as of August 23, 2018, petitioner submitted this appeal asserting that PPS has not provided him with records “without undue delay” as it is required to do.

For the reasons discussed below, we grant the petition.

DISCUSSION

A. Non-responsive records

The disputed emails that petitioner received on July 19, 2018 are in fact responsive to the agreed query—however the format in which they were provided to him obscured the responsive portions of the emails. These particular emails were sent an HTML format. An HTML message carries with it a plain-text version that is not visible to the end-user unless his or her email software is incapable of displaying the HTML version. In this case PPS informs us that the plain-text version and the HTML version contained slightly different text, but the HTML version is what was printed out and provided to petitioner. PPS now recognizes the error, and how it occurred, and is working to provide petitioner with the plain-text versions of the messages from the July 19, 2018 production.

B. Unreasonable Delay – ORS 192.329

ORS 192.329 provides that,

A public body shall complete its response to a written public records request that is received by an individual identified in the public body’s procedure described in ORS 192.324 as soon as practicable and without unreasonable delay.

This petition was filed on the 34th business day after petitioner paid the fee for production of these records. Had PPS dedicated a full-time employee to do nothing but respond to petitioner’s request it could have completed its response within that period. But, the public records law does not require a body to focus exclusively and immediately on a particular records request to the dereliction of other co-equal responsibilities. Likewise, it does not permit an agency to ignore or “backburner” a particular request because it is unduly burdensome.

There is no one right answer to what portion of a public body’s resources and focus must be dedicated to public records responses in general or any one response in particular. A body must dedicate sufficient resources that it can respond “as soon as practicable and without unreasonable delay.” ORS 192.329(1). That is to say, it must act in an objectively reasonable fashion.

The payment of a fee for production of records does not create within an agency new capacity to respond to an unusually large request, rather it compensates the agency for the use of its existing capacity and resources for the requestor’s purposes rather than the agency’s purposes. It would not be reasonable for an agency to dedicate resources to maintain the capacity to handle unusually large public records requests without at least some delay. It must still handle them, of course, but to have the staffing in place to address an unexpected spike in records requests resulting from a discrete event, or the rare massive request, without some amount of delay would

mean that most of the time those personnel would be idle. We emphasize *unexpected*; an agency must devote sufficient resources to respond to its routine flow of public records requests in a timely manner. See, *Petition of Monahan*, MCDA PRO 16-23 (2016) (agencies may not justify their delay by chronically understaffing records responses).

It must then be reasonable for an unusually large request to take longer on the calendar to fulfil than the mere hours of its estimate would otherwise indicate. But how long is too long? A request for upwards of 17,200 emails is an unusually large request for PPS, or any local governmental body. On the other hand, petitioner is understandably concerned about the lack of visible activity on his request despite being told by PPS that he would receive batches of documents from them as they became available.

PPS has one dedicated public records officer whose duties include coordinating with the various departments necessary to prepare and review responses to public records requests. PPS reports that, in the two months since petitioner paid the estimated fee, it has spent 10 hours working on completing its response to his request. This time has been limited due to other required duties, to include the 131 other public records requests that have needed attention during this period. This is all understandable, however, if PPS' response to petitioner's request continues at the same rate moving forward, it will not have completed its estimated 190 hours of work until January 3, 2021. This is not "as soon as practicable and without unreasonable delay."

For its response to a massive request to be reasonable, PPS must demonstrate that it is incrementally and steadily working on a request with a projected completion date that makes sense under the circumstances. A delay of years in responding to a request is not in keeping with the policy purposes of the Oregon Public Records Law, even as to a large request. See, e.g., *Fiduccia v. United States DOJ*, 185 F.3d 1035 (9th Cir. 1999) (so noting as to FOIA). PPS has not demonstrated sufficient efforts at this time to meet that standard as to this request.

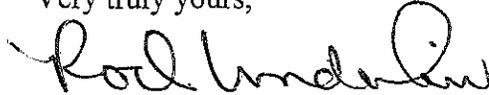
Where there has been an unreasonable delay, as we find here, ORS 192.407(3) requires that we set a timeline for completion of the request. PPS's cost estimate in this case assumes that it can review 100 emails per hour of labor. Balancing the competing interests, we think it would have been reasonable for PPS to produce, on a rolling basis, 2,500 emails per month. Had PPS proceeded at this rate from the date Mr. Buchal paid his fee, work would have been complete by December 6, 2018, which is 90 days from the date of this order. This may well require additional staffing, or outsourcing, by PPS to continue to meet its timeliness obligations on other pending or yet-to-be-received records requests. As the Ninth Circuit has noted in an analogous situation:

This is not to denigrate the practical problems. It may be that agency heads, such as the Attorney General in this case, can be forced by the Freedom of Information Act to divert staff from programs they think more valuable to Freedom of Information Act compliance. It may be that people with ulterior motives can use Freedom of Information Act requests to interfere with the proper functioning of federal agencies. Arguably taxpayers are providing an excess of free research and copying services to authors and investigators. But these policy concerns are legislative, not judicial, and we intimate no views on them.

ORDER

Accordingly, the petition is granted. Pursuant to ORS 192.407 PPS shall complete its response to the portion of petitioner's request for which fees have been paid within 90 days of the date of this order, which is December 6, 2019.

Very truly yours,



ROD UNDERHILL

District Attorney

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

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