



ROD UNDERHILL, District Attorney for Multnomah County

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

September 10, 2018

Bruce Gilley
6533 S.E. 30th Avenue
Portland, Oregon 97202

Krista Stearns
Assistant General Counsel
Portland State University
P.O. Box 751
Portland, Oregon 97207

Re: Petition of Dr. Bruce Gilley, on behalf of the Oregon Association of Scholars, seeking a fee waiver from Portland State University

Dear Dr. Gilley and Ms. Stearns:

In his petition, received by this office on August 29, 2018, petitioner Dr. Bruce Gilley requests that we order Portland State University (PSU) to waive fees associated with a request for records.

On May 30, 2018 Adam Goldstein, on behalf of the Washington, D.C. based Foundation for Individual Rights in Education (FIRE) submitted a public records request to PSU for:

1. The letter submitted to Dean Stephen Percy by a group of PSU students relating to Professor Bruce Gilley in or around September or October 2017, with student identifying information redacted to the extent required by FERPA;
2. Any communication by or between Dean Percy, Provost Margaret Everett and/or PSU's Global Diversity and Inclusion Office referencing or relating to Professor Gilley from September 2017 to present; and
3. Any communication between Dean Percy, Provost Everett and any member of the Political Science Faculty relating to Professor Gilley from September 2017 to present.

Mr. Goldstein additionally requested a fee waiver. PSU responded by providing a September 15, 2017 letter responsive to item 1 and quoting fees as to items 2 and 3. After some back and forth, Mr. Goldstein reduced the scope of his request and PSU reduced its fee estimate, but still declined to waive fees as to these items. On August 7, 2018 Mr. Goldstein appealed this fee waiver denial to the Attorney General on behalf of FIRE

The Attorney General's office responded that it did not have jurisdiction over public records disputes involving PSU and referred Mr. Goldstein to the Multnomah County District Attorney. On August 29, 2018 Dr. Gilley submitted a petition to this office on behalf of the Oregon Association of Scholars (OAS), of which he is president, stating that he was seeking:

1. The specific letter of complaint of September 29, 2017 that the university alleges in its formal report was the basis for the launching of the investigation [...]; and
2. Any correspondence between PSU's Dean of the College of Urban and Public Affairs, University Provost, and the Office of Global Diversity and Inclusion concerning Dr. Gilley between September 15, 2017 and June 15, 2018.

Dr. Gilley regards this petition as a continuation of FIRE's initial request as he notes his appeal is specifically related to the denial of a public interest fee waiver by PSU.

For the reasons discussed below, we deny the petition as premature.

DISCUSSION

A. Standing

The district attorney's role in the public records process is to review the decisions of public bodies in the county on public records matters. We do not have the jurisdiction to order an agency to do anything where it has not first had the opportunity to make its own initial decision on a request. *Morse Bros. v. Or. Dep't of Econ. Dev.*, 103 Or App 619, 622 (1990) ("The Public Records Law clearly contemplates that agencies have the opportunity to review the requested records and to act on the request before the Attorney General or the courts can review the matter.")

ORS 192.324(6) provides that "a requester who believes that there has been an unreasonable denial of a fee waiver or fee reduction may petition the Attorney General or the district attorney[.]" (emphasis added) Here neither Dr. Gilley personally, nor the OAS as an organization, have made a public records request to PSU. Rather he seeks to adopt FIRE's request as his own and appeal PSU's denial of that request. Because neither Dr. Gilley nor OAS were the "requester" in this case, neither has yet satisfied the jurisdictional prerequisites to enable us to review the matter.

In the abstract it seems unlikely that PSU would elect to grant a fee waiver to Dr. Gilley, whom it believes to be acting out of personal interest, where it has already denied a fee waiver to a national advocacy organization (FIRE) seeking similar information. And were that the only issue in play, it would be more efficient to simply evaluate the fee waiver on the merits in this order.

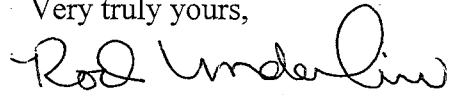
However, PSU correctly observes that Dr. Gilley's request in his petition and the requests made by FIRE are not the same. They relate to the same topic, and many records may indeed be responsive to both requests, but the scope and specificity of Dr. Gilley's request differs from FIRE's request. This will result in a different fee estimate, different burden on PSU, and a different calculus in assessing a waiver request.

Dr. Gilley must first make his records and fee waiver requests to PSU. If either of those requests are denied, he may then petition this office to review that decision.

ORDER

Accordingly, the petition is denied as premature.

Very truly yours,

A handwritten signature in black ink that reads "Rod Underhill". The signature is written in a cursive style with a large, looping "R" and "U".

ROD UNDERHILL
District Attorney
Multnomah County, Oregon