



**ROD UNDERHILL**, District Attorney for Multnomah County

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

June 22, 2018

Rachel Winterling

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

Re: Petition of Rachel Winterling seeking a determination of undue delay under ORS 192.407

Dear Ms. Winterling and Ms. Johnston:

In her public records appeal, dated June 11, 2018, petitioner Rachel Winterling, asks this office to order the Portland Police Bureau (PPB) to disclose:

**[a]ny and all records pertaining to the 2016 sustained allegation of my case #2015-C-0377, relating to PPB Officer Scherise Hobbs' misuse of the Law Enforcement Data System for non-law enforcement purposes, as well as related correspondence**

Ms. Winterling made her records request and request for a fee waiver on May 10, 2018. In its acknowledgment sent that same day, PPB wrote:

Please note that the Police Bureau is currently experiencing a significant backlog of public records requests (both electronic and hardcopy requests). Please expect up to 4 weeks before a response is received concerning your public records request. For status updates concerning your public records request please refer to the Portland Public Records Request Center via the link below. Thank you for your patience.

On June 11, 2018, having received no further communication from PPB, Ms. Winterling filed an appeal with this office pursuant to ORS 192.407(1)(a) and requests a finding that her request is deemed denied because PPB did not comply with the fifteen day response time set out in ORS 192.329(5). Petitioner also challenges PPB's assessment of a \$30 initial research fee in this case.

For the reasons discussed below, although we agree that PPB did not respond within the time set out in ORS 192.329(5), PPB has made sufficient showing under ORS 192.329(6) to excuse non-compliance at this time. We also do not find a violation of the fee provisions of ORS 192.324(4).

## DISCUSSION

### A. Timeliness of response – ORS 192.329(5)

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(6) further provides,

The time periods established by ORS 192.324 and subsection (5) of this section do not apply to a public body if compliance would be impracticable because:

- (a) The staff or volunteers necessary to complete a response to the public records request are unavailable;
- (b) Compliance would demonstrably impede the public body's ability to perform other necessary services; or
- (c) Of the volume of public records requests being simultaneously processed by the public body.

PPB asserts that at this time it is not capable of complying with the fifteen day deadline because of the volume of requests it is handling and because diverting the staff necessary to bring the present approximately four week backlog down to 15 days would impede the public body's ability to perform other necessary services.

PPB states that in 2015 it received 17,377 public records requests, in 2016 it received 20,059 requests, and in 2017 21,655. It projects 22,632 requests for 2018, or about 1,886 requests per month. In response to this large, and increasing, quantity of requests (year over year increases of 15% and 8% respectively) PPB in 2017 created a dedicated unit with a supervisor and five full time employees (FTEs) whose sole job is to respond to public records requests. City Council has approved two additional FTEs for this unit in the upcoming fiscal year, but those funds do not become available until July 1, 2018.

Ms. Johnston, on behalf of PPB, states that to comply with ORS 192.329(5)(b) would require dedicating one FTE solely to sending out update notices on the anticipated time required to fulfil the request. This would proportionately increase the backlog and response times. PPB has made the policy determination that rather than comply with this section, it will assert under ORS 192.329(6)(b) and (c) that compliance would be impractical at this time and provide a blanket notice to all requestors that response times are, presently, around four weeks.

Against this backdrop then, the question for us is whether or not the timeline in ORS 192.329(5) applies to this request, or if PPB has demonstrated that compliance is “impracticable” at this time.

Petitioner argues that she believes PPB never intended to release the records at issue, so the exemptions in ORS 192.329(6) do not apply. This misses the point. Regardless of whether or not PPB ultimately intends to grant or deny the request, its position is that it will address the request one way or the other when it comes to the front of the queue. Certainly, any individual request *could* be pulled out of the queue and handled in an expedited manner, but each time that is done each other request is pushed back a step. We cannot look at a single request in isolation and disregard the systemic implications.

We also note that the legislature was aware of PPB’s particular situation and its volume of requests when it adopted the “safety valve” in ORS 192.329(6)(c). Feb. 22, 2017, Oregon Committee Minutes, Senate Committee on General Government and Accountability (Statement of Scott Winkels). This does not grant PPB free reign to take as long as it pleases to produce records, but we do find it persuasive that, at least in part informed by the substantial volume of requests faced by PPB, the legislature created a safety valve for inundated agencies. In this case we find that PPB has made sufficient showing of the volume of requests it is handling, and its steps to increase staffing to meet this increased volume, to make out its claim of impracticability under ORS 192.329(6)(c).

If the timeline in ORS 192.329(5) does not apply, as we have concluded here, an agency is then bound to complete its response to a public records request “as soon as practicable and without unreasonable delay.” ORS 192.329(1). This is a fact-specific standard, but in its application we have previously found that a delay of over a month did not constitute a denial. *Petition of Sordyl*, MCDA PRO 16-24 (2016). The Attorney General has concluded that a delay of two months was likewise insufficient to establish a denial. *Petition of Kellington*, Att’y General PRO (3/23/2009). In this case, petitioner filed this appeal 21 business days after making her request. On this record we do not find that this amount of delay constituted a denial of her request.

B. Fees – ORS 192.324(4)

ORS 192.324(4)(c) provides that,

The public body may not establish a fee greater than \$25 under this section unless the public body first provides the requester with a written notification of the estimated amount of the fee and the requester confirms that the requester wants the public body to proceed with making the public record available.

Petitioner challenges PPB’s assessment of a \$30 research fee in order to begin work on her request on the basis that it is in excess of the \$25 limit set out in ORS 192.324(4)(c)

PPB has asserted that it estimates the costs will be in excess of \$30 on all cases given the staff time necessary to locate and produce files, hence the “standard” research fee. Accordingly, PPB requires pre-payment of that fee to start work on any request, unless a fee waiver is granted. ORS 192.324(4)(c) requires that PPB give notice of this cost to a requestor before it begins work

and allow the requestor to decide to proceed or not. PPB has done so. Petitioner was notified of the \$30 cost and had the option to choose to proceed or not proceed with her request.

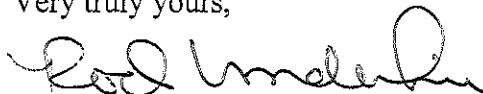
Nothing in the public records law prohibits an agency from providing serial fee estimates. That is to say, it will often be the case that while an agency will know the cost to retrieve a relevant file or run a particular data query, it cannot know the cost of producing the results of the search before it has been performed. In this case an agency is well within the authority of ORS 192.324(4) to assess its estimated costs to retrieve the file, and then make a second estimate once it has determined the scope of work necessary to produce the previously unquantified contents of the file.

PPB is not in violation of the fee provisions of ORS 192.324(4). And, for the same reasons discussed in the previous section, we do not at this time find an undue delay in processing petitioner's request for a fee waiver.

**ORDER**

Accordingly, the petition is denied.

Very truly yours,



ROD UNDERHILL  
District Attorney  
Multnomah County, Oregon