



ROD UNDERHILL, District Attorney for Multnomah County

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August 8, 2019

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

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

Re: Petition of Paul Terdal seeking fee waivers for certain records requests made to the Portland Public School District

Dear Mr. Terdal and Ms. Kane:

In two related public records appeals petitioner Paul Terdal asks this office to order Portland Public Schools (PPS) to waive or reduce the quoted fees in response to public records requests that he has made. Because the issues are similar, we have consolidated these two petitions for purposes of this order.

In the first request at issue (Request 1), petitioner sought the contents, attachments, and metadata for all emails in a five month period to or from six special education administrators that met keyword searches related to Applied Behavior Analysis (ABA) or Senate Bill 135. In the second request (Request 2), petitioner sought 1) the contents, attachments, and metadata for all emails in a fourteen month period between nine special education administrators that met keyword searches related to ABA, 2) all communications with a particular special education contractor relating to ABA, and 3) all correspondence associated with a PPS ABA Education Stakeholder Group.

As to Request 1, PPS' initial search produced 915 emails. PPS estimated a cost of \$524 to cover the 11 hours of staff time necessary to review these messages and complete its response to the request. PPS denied a fee waiver, but suggested a path to narrowing the scope of the request and, thus, reducing the cost.

As to Request 2, PPS' initial search produced over 3,000 responsive messages, many of which likely concern the provision of services to individual students and would require detailed review and redaction prior to release to comply with federal law (FERPA). As to the second and third parts of Request 2, PPS states that it has already provided petitioner with other records, free of charge, in each of those areas. PPS expects the email information to be largely duplicative, from a public interest standpoint, of those documents already provided. In total, PPS estimated a cost of \$1,887 to cover the 42 hours of staff time necessary to respond to this request. PPS also denied a fee waiver on this request.

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

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 that public interest, and (3) the extent to which a waiver would burden the public body.” PUBLIC RECORDS AND MEETINGS MANUAL (2019) at 24 (hereafter “MANUAL”).

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).

This is not the first time we have been called on to resolve a fee waiver dispute between these parties. In September, 2018, we denied a similar petition seeking, in part, a waiver of fees for a substantial records request. *Petition of Terdal*, MCDA PRO 18-34 (2018). In that order we summarized the context of the request as follows:

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.

In response to these petitions PPS has supplemented the above quoted information and indicates that, this calendar year, petitioner has made six public records requests. In response, PPS has produced 1,700 pages of documents, provided about 22 hours of staff time to gather and review these records at no cost. Exclusive of the fees at issue in these appeals, PPS states it has only assessed \$75 so far this year to petitioner. Although each of petitioner’s requests seeks different documents, they all pertain to the same topic: PPS’ policies and practices relating to autistic students and/or ABA services.

To aggregate, not counting the four month window at the end of 2018 for which we have no information, PPS has so far provided petitioner with about 2,700 pages of documents involving in excess of 125 hours of staff work and received only \$327 to cover those costs.

Our analysis of PPS' response to the present fee waiver requests is informed by this history. The Attorney General has provided the following guidance to public bodies in evaluating fee waivers where the topic of the request is a matter of public interest:

Facts typically relevant to a fee-waiver decision include how narrowly tailored the request is to a matter of public interest; the time and expense needed to fulfill the request; the volume of the records requested; the need to segregate exempt from nonexempt materials; whether the fee was avoidable; and the ability of the requester to pay the fee. A public body may consider the aggregate effect of numerous public records requests from the same requester in assessing its burden.

MANUAL at 25.

As PPS acknowledges in its submission, petitioner is a passionate advocate of the benefits of ABA therapy, and has worked tirelessly to create public support for its use for children with autism. PPS further acknowledges that there is a public interest in its processes, policies, and instructional practices as to special education students generally and autistic students specifically. This has motivated PPS' decision to release the substantial quantity of documents that it has provided to petitioner over the last two years at little or no cost. On the other hand, PPS also points out that petitioner is a frequent litigant against PPS and sees these sweeping requests as advancing his personal interests more significantly than the greater public interest in the topic, particularly given the quantity of documents already released.

We need not decide if PPS was correct in its determination that these records would be of only limited or personal interest because, even if they were a matter of public interest, PPS is still permitted to balance their utility against the burden of providing them. PPS has articulated a substantial burden that it has already undertaken and required the diversion of special education administrators and staff from the actual provision of special education services to search for and provide records. Notwithstanding this burden, PPS has already released a large quantity of documents of public interest at little or no cost to petitioner. Applying the deferential standard of review in ORS 192.324(6) we conclude that PPS's fee waiver decisions in these cases were within the range of legally permissible options under ORS 192.324(5).

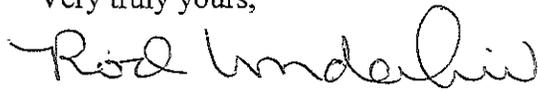
Petitioner also raises a constitutional challenge to PPS' decision to deny him a fee waiver and grant one to what he views as a similarly situated requestor. PPS has provided context to explain its view of the differences between the two requestors and requests but, in any event, we are not empowered to resolve constitutional claims between public records litigants, and do not express an opinion on that question. *Petition of Shepherd for Hovies*, MCDA PRO 06-10 (2006) (deferring to the circuit court a Fourteenth Amendment challenge to the denial of a records request).

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ORDER

Accordingly, the petition is denied.

Very truly yours,

A handwritten signature in black ink that reads "Rod Underhill". The signature is written in a cursive style with a large, prominent loop at the end of the name.

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

19-37, 19-38