



ROD UNDERHILL, District Attorney for Multnomah County

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August 14, 2019

Mario Sarich
11707 NW Laidlaw Road
Portland, Oregon 97229

Jonathan Strauhull
Multnomah County Attorney's Office
501 S.E. Hawthorne, Suite 500
Portland, Oregon 97214

Re: Petition of Mario Sarich seeking a fee waiver regarding a public records request of the Joint Office of Homeless Services

Dear Mr. Sarich and Mr. Stauhull:

In his public records petition Mario Sarich asks this office to order the Joint Office of Homeless Services to provide a variety of records at no cost. The records at issue relate, broadly, to communications regarding the relocation of the Hazelnut Grove camp or the establishment of any other homeless camp in the St. Johns neighborhood. Those portions of the request that are bounded in time request records from 2017 to present.

Petitioner's initial request was very broad, and the county estimated over 100,000 documents would be responsive. The county engaged with petitioner, who then submitted a narrowed, though still expansive, request. This is the request at issue here. The initial request was made on May 23, 2019 to Denis Theriault. Mr. Theriault timely acknowledged the request, communicated with counsel, and timely quoted fees to continue scoping the request. Mr. Theriault then left the country on June 8. Petitioner responded on June 18 with a new, narrowed, version of the request. Mr. Theriault returned to the country on July 1. On July 18, he responded to petitioner that he expected to have a full fee estimate to him by the end of the next week. On July 30 Mr. Theriault sent a fee estimate for completion of the narrowed request.¹

Petitioner now seeks a fee waiver on two grounds: first, he argues his request is in the public interest and the county acted unreasonably in denying his request; second, he argues that the county took too long to reply to him and, thus, this office should exercise our discretion under ORS 192.407(3) to sanction the county and order the records produced without cost. For the reasons set out below, we decline to do so.

¹ This chronology omits various communication between the county and petitioner, but the requirements of a response to a public records request are statutorily defined and the dates of legal significance to that analysis are noted.

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).

The county challenges petitioner’s suggestion that he is a disinterested PSU student appears and points out that his initial approach, first to the county chair’s office and then to the Joint Office, was expressly made in his capacity as an intern of Kafoury & McDougal. Of course that a law firm is seeking records does not automatically mean that the request is not also in the public interest, but it certainly frames the analysis differently than if a student were seeking the records for purpose of research, publication, or study.

In any event, the county is correct that even if this request is in the public interest, a public body is entitled to exercise its discretion to balance that interest against the burden on the body in fulfilling the request. Here the county’s email search turned up 14,588 pages of responsive documents, for which it quoted \$3,000 in fees to cover the legal review for exemptions. ORS 192.324(4)(b) permits an agency to quote fees for “the cost of time spent by an attorney for the public body in reviewing the public records, redacting material from the public records or segregating the public records into exempt and nonexempt records.” The county has also already granted a partial waiver of fees by waiving any costs incurred by the Joint Office and the county communications office in searching for responsive records.

Applying the deferential standard of review in ORS 192.324(6) we conclude that the county’s fee waiver decision in this case within the range of legally permissible options under ORS 192.324(5).

B. Penalty for Untimely Response – ORS 192.407

Separate and apart from our analysis of the propriety of a public body’s fee waiver decision under ORS 192.324(5), ORS 192.407 was amended by HB 2353 (2019), effective June 4, 2019, to give the district attorney the authority to impose against a public body a financial sanction either in the form of a \$200 fine or a reduction in quoted fees if the district attorney

determines that the body's response, or lack of response, to a properly presented public records request violated the timeliness provisions of ORS 192.329.

We recognize that at the time that petitioner submitted his narrowed request, Mr. Theriault, with whom he had been communicating, was out of the country and did not return until July 1. Mr. Theriault is the Joint Office's sole designated recipient of public records requests under ORS 192.324. We also recognize that there is some ambiguity in the statutory language used to describe the start of the 15 business day timeline. ORS 192.329 and 192.324 together provide that the 15 days start from the point at which the individual identified as the agency's public records contact under ORS 192.324 "receives" the request. ORS 192.324(2). The issue of when a person "receives" a request has not been addressed by either party for purposes of this petition. If Mr. Theriault "received" the request when he returned to the office on July 1, 2019, then his response on July 18 that he expected to have a full estimate by the end of the following week came of the 14th business day after his receipt; if on the other hand he "received" the request when it hit his inbox, then his response was on the 21st business day and constituted a statutory denial.²

Assuming, without deciding, that the response was on the 21st day, and thus constituted a denial, given all the facts and circumstances we decline to exercise our discretion to impose a punitive fee waiver in this case. There are too many close legal and factual issues in this case to justify a sanction; however were a cleaner case presented involving delay due solely to the protracted absence of the only designated point of contact for an agency, we might well reach a different conclusion.

ORDER

Accordingly, the petition is denied.

Regards,

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

By: 
Adam Gibbs
Senior Deputy District Attorney

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² It is also an arguable point whether Mr. Theriault's response on July 18 stopped the clock, or whether it was only the final quote of fees on July 30 that did so. Resolution of this question does not alter our disposition of this petition.