



ROD UNDERHILL, District Attorney for Multnomah County

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

October 10, 2019

Matt Chapman
Free Our Info
matt.chapman@freeourinfo.com [by email only]

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

Re: Petition of Matt Chapman seeking a determination that a revised fee quote constituted a denial of a records request by the City of Portland

Dear Mr. Chapman and Ms. Johnston:

In August, 2018 Mr. Chapman made a public records request to the City of Portland for the to address, from address, bcc address, cc address, time, and date for all emails sent from an official city email address in January 2017. The City eventually estimated that the cost would be \$133.35 to produce these records. Petitioner paid this fee, the receipt of which was acknowledged on May 3, 2019.

The City then began work on his request. In the course of doing its work, the City determined that there were 5.8 million responsive records and that substantially more work would be needed to complete the request than had initially been quoted. After creating a program to automate some of the necessary redaction process, the City informed petitioner that it would actually cost \$1,156.62 to provide the records but that, for reasons not elaborated on, the City granted a partial fee waiver in the amount of \$300. Thus, as of September 4, 2019 the fee quote was \$732.27, of which petitioner has paid \$133.35 already, leaving a balance of \$598.92.

Petitioner has filed an appeal with this office arguing that the escalation in fee constitutes a constructive denial of his request and asserts that the \$732.27 is not a proper fee because it covers work for performing redactions that he asserts are not proper under the public records law.

The City, given the unusual posture of this case, has offered two paths forward to petitioner 1) that they will refund the already paid amount if he does not wish to receive the requested records; 2) that they will produce \$133.35 worth of the records as a "sample" so that petitioner can review the nature and scope of the redactions the City intends to apply and, if he so desires, litigate the propriety of those redactions.

DISCUSSION

A. Timeliness – ORS 192.407, ORS 192.329

Petitioner first challenges the City's slow response on this case. Under ORS 192.329, the City was required to either complete its response to petitioner's request, or provide a reasonable estimate of when it would do so, within 15 business days of receiving the request. The procedural background of this case is convoluted, but in its barest elements the City re-activated petitioner's request on Friday, April 12, 2019.¹ On Monday, April 15, 2019, the next business day, the City provided its initial fee estimate. Its obligation to perform further work was then tolled pending resolution of the fee. ORS 192.329(3)(a). The City acknowledged receipt of petitioner's payment on May 3, 2019 and on May 22, 2019, 13 business days later, indicated that it estimated an additional seven business days were necessary to complete its response. Given a start date of April 12, 2019, the estimate of additional time on May 22, 2019 was a permissible and timely response under ORS 192.329(5)(b).

The May 22, 2019 timing estimate indicated seven additional business days. It actually took closer to 75 business days to provide the final fee quote. Petitioner's frustration at the moving target is understandable. The City sent multiple updates indicating yet more time was anticipated.² Notwithstanding ORS 192.329(5), a public body must still complete its request "as soon as practicable and without undue delay;" this is an independent requirement. ORS 192.329(1).

Although, as articulated above, the City is in technical compliance with ORS 192.329(5)(b), ORS 192.407(1)(c) provides this office with jurisdiction to consider any alleged non-compliance with ORS 192.329, which includes the mandate to respond without undue delay in ORS 192.329(1). As to almost any request we would consider a four month delay and exceeding the initial estimate of extension by a factor of 10 to be "undue delay" and proceed to evaluate appropriate remedial measures under ORS 192.407(3).

We do not do so here because of four factors unique to this case: 1) this request was unprecedented in scope and nature; 2) it touched every single City bureau and required consultation with multiple representatives with bureau-specific applicable exemptions; 3) it required the creation of a new program to automate review of the 5.8 million entries to make a response even possible; 4) the City has already granted a significant fee reduction (slightly

¹ This case is procedurally unique in that the City reopened a records request to which it had already completed its response in light of an intervening decision by this office on an unrelated petition. That decision led it to determine that its initial response to this petition needed to be revisited. Thus, for purposes of this petition April 12, 2019 has to be the start date for the applicable timelines because otherwise we would have to conclude that the City has already "completed" its response to this request by its denial of it in August 2018.

² ORS 192.329(5)(b) does not appear to require the public body to continually update its estimates if it subsequently determines that it erred, as the City did in this case, though courtesy and the avoidance of unnecessary appeals would weigh in favor of doing so anyway.

over 25%) despite petitioner neither requesting it, nor providing any information to support a waiver.

B. Fees – ORS 192.324(4)

ORS 192.324(4) provides that “[t]he public body may establish fees reasonably calculated to reimburse the public body for the public body’s actual cost of making public records available, including costs for summarizing, compiling or tailoring the public records, either in organization or media, to meet the request.” Such a fee may include “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.” *Id.*

Petitioner’s primary argument in support of his petition is that the \$732.27 is not a proper fee because it covers work for performing redactions that he asserts are not allowed by the public records law. That is, he reasonably believes that the City intends to redact personal email addresses from the responsive records pursuant to ORS 192.345(40). He provides an argument as to why these redactions would be unsupported and, accordingly, why the fee is not permissible.

In the abstract, petitioner’s position makes sense: he should not be required to pay fees for work to perform redactions that are not legally supported. However, this office only has jurisdiction to review delay, denials of fee waivers, and substantive denials of requests. Issuing a fee estimate, absent evidence of bad faith not present here, is not a denial of a request. Petitioner is not, however, without recourse. This precise situation was presented to this office and the Multnomah County Circuit Court two years ago. *Petition of Merrick*, MCDA PRO 17-35 (2017); *Merrick v. City of Portland*, Mult. Co. Cir. Ct. 17CV32008, Nov. 13, 2017, Order (LaBarre, J.); *Petition of Merrick*, MCDA PRO 17-63 (2018).

In *Merrick*, petitioner sought contact information for individuals who had submitted complaints to a particular city portal. There were 20,000 entries and the City estimated over \$39,000 dollars to review and redact various information. Petitioner challenged the imposition of those fees asserting that the underlying claims of exemption were invalid, so he should not be required to pay the fees. We held that “[o]nce an agency quotes a fee, it is not required to perform work until the fee is received. We agree with the City of Portland that any discussion relating to [ORS 192.355(2), the Personal Privacy exemption, and [ORS 192.345(40)], the Email Address exemption, is premature.” *Merrick*, 17-35 at 2. Petitioner sought review of our order in the circuit court. The court eventually ordered that the petitioner receive a smaller sample of the records with claimed exemptions asserted and applied, and pay proportionally smaller fee. This was intended to, and did, create a record that this office had jurisdiction to review on the merits.

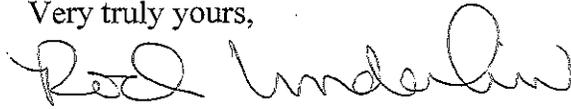
Here, as in *Merrick*, it is a reasonable interpretation of the communications sent by the City that it intends to assert exemptions under ORS 192.345(40), potentially among others. However, the City has not yet done so and, pending the payment of its estimated fee, it is not required to do so. Until the City has actually withheld records pursuant to a public records exemption, we may not review whether or not an exemption is applicable. The City

has offered to petitioner that it can apply the payment he has already made to produce a sample of responsive records under process used in *Merrick*. If petitioner choses to take the City up on this offer, we can then review any asserted exemptions on their merits and that decision can guide the parties in their path forward as to the larger data set.

ORDER

Accordingly, the petition is denied at this time.

Very truly yours,

A handwritten signature in black ink, appearing to read "Rod Underhill". The signature is written in a cursive, flowing style.

ROD UNDERHILL
District Attorney
Multnomah County, Oregon