



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

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October 14, 2019

Paul Boden  
6136 N.E. 18th Avenue  
Portland, Oregon 97211

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

Re: Petition of Paul Boden seeking records from various City of Portland bureaus

Dear Mr. Boden and Ms. Johnston:

At issue here are three consolidated public records appeals filed by Mr. Boden on behalf of the Western Regional Advocacy Project (WRAP), Sisters of the Road, Street Roots, and Right to Survive. Petitioner seeks review of the City of Portland's responses to three records requests made on May 21, 2019 to the City Auditor's Office, the Portland Police Bureau (PPB), and the Office of Management and Finance (OMF).<sup>1</sup> Petitioner included with his appeals a summary of the records sought from each bureau, which is reproduced below:

For the Portland Police Bureau

- Any and all memoranda, documents, meeting notes and minutes, and correspondence, including electronic correspondence, containing or referencing:
- Agreements between ESDs [Enhanced Service Districts] and the Portland Police Bureau.
- Contract No. 30002749.

For the Office of Management and Finance

- Any and all memoranda, documents, meeting notes and minutes, and correspondence, including electronic correspondence, containing or referencing:
- The current policy for levying assessments on different categories of property (government, nonprofit, etc).
- The development of the ESD model and the transition from BIDs to ESDs in Portland.
- Support for ESDs during the formation process and the facilitation of the formation of new ESDs.

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<sup>1</sup> A fourth request was also made to the Office of the Mayor. This office dismissed an appeal of that request for lack of jurisdiction on October 2, 2019.

- Expanding the category of property owners who are obligated to pay the business management license fee.

Final versions of documents containing or referencing:

- Any audits conducted of any ESDs.
- The creation of the Bureau of Revenue and Financial Services as it relates to assistance for ESDs and potential ESDs.
- Other correspondence between OMF and ESDs and public agencies as it relates to publicly owned property within BIDs.

For the City Auditor/Council Clerk

Final versions of documents containing or referencing:

- Oversight measures for ESDs.
- Support for ESD formation expressed by governmental and non-governmental agencies.
- Opposition to ESD formation expressed by business management license fee payers.
- Levying of assessments on publicly-owned properties.

In response, the Auditor's Office indicated that any responsive documents in its possession were already publicly available in the city archives or electronically on the city website. The Auditor's Office further provided petitioner with a list of documents it had been able to locate on the city website. OMF provided petitioner with the material it was able to locate without requiring a search of email archives. OMF then estimated it would take 40-60 hours to complete the balance of the request. PPB provided petitioner with a single contract responsive to the request, and an extension of the contract.

On June 12, 2019 representatives from all affected bureaus met with petitioner, and other representatives of the organizations making these requests, in an attempt to clarify and narrow the requests. After this meeting, additional records were released by the various bureaus and the City sent communications through its public records portal documenting the City's understanding of the agreed path forward on these requests.

Specifically, PPB sent a written communication to petitioner on June 19, 2019 setting out its understanding of the clarified scope of the request, which stated in part, "[I]n subsequent discussion [on June 12], I understood that what WRAP really wanted was final contract documents [...] If I have misunderstood, and you do not believe this request is fulfilled, please call me as soon as possible to discuss." Petitioner did not follow up with the PPB's attorney as invited and, as such, PPB states it believed the request fulfilled at that point.

OMF sent petitioner a message on July 3, 2019 indicating that it had provided all the records it could locate without petitioner identifying specific search terms to use in an email search; petitioner did not respond with any search terms.

The Auditor's office did not send any further messages as it believed it had completed its response to the request.

Petitioner then, on September 24, 2019, appealed to this office for orders compelling compliance with each of the original records requests. It was by way of this appeal that the City learned that petitioner did not believe that the City had fulfilled the terms of the clarified requests. In response, the City reopened the PPB and OMF requests, drafted a proposed query for an email archive search, and quoted fees to petitioner based on those drafted queries.

## DISCUSSION

### A. Permissible responses to a request – ORS 192.329

In relevant part, ORS 192.329 provides that a public body's response to a public records request is complete when it "provides access to or copies of all requested records within the possession or custody of the public body [...] or explains where the records are already publicly available." ORS 192.329(2)(a).<sup>2</sup>

A public body may also provide petitioner with an estimate of any costs that it is permissible for it to pass on in responding to the request. ORS 192.324(4). Once a fee estimate is provided, "the obligation of the public body to complete its response to the request is suspended until the requestor has paid the fee, the fee has been waived by the public body [...] or the fee otherwise has been ordered waived." ORS 192.329(3)(a).

Lastly, "[a] public body may request additional information or clarification from a requester of public records for the purpose of expediting the public body's response to the request." ORS 192.329(4). Where a public body has done this in good faith "the public body's obligation to further complete its response to the request is suspended until the requester provides the requested information or clarification or affirmatively declines to provide that information or clarification." *Id.*

If either a fee estimate or a good faith request for clarification has been issued by the public body, and the requestor does not respond within 60 days, the public body shall consider the request closed. ORS 192.329(3)(b) and 192.329(4)(b). This does not prevent a requestor from submitting a subsequent request, but after that 60 day period has lapsed the public body is relieved of any further obligation as to the original request.

#### *i. Auditor's Office – Petition 19-50*

The Auditor's Office responded to petitioner that it did not possess any responsive documents apart from what was already available in the archives and online. A public body is not required to perform research for a requestor where the universe of possible documents is already publicly available. The auditor's staff has directed petitioner to the city archives, provided suggestions as to how best to search for his topic of interest, and, indeed, actually performed that search and gave him a list of at least some documents that met his parameters. This surpasses the minimum requirement in ORS 192.329(2)(a) that a public body "explain[] where the records are already publicly available."

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<sup>2</sup> No exemptions from disclosure are at issue in these appeals, so permissible responses relating to potential exemptions are not discussed.

*ii. Portland Police Bureau – Petition 19-49*

As to the PPB request, PPB sought clarification of the request under 192.329(4). PPB then communicated to petitioner that, pursuant to the clarification obtained, it believed it had provided all responsive documents. This office has reached out to petitioner and the City and the only factual account of the clarification meeting on June 12, 2019 is that contained in the messaging history through the city’s public records portal. Per that clarification, PPB has completed its response to the request.

The present appeal makes clear that there was not a meeting of the minds on this reduction in scope, but on the record before us there is no way that the City could have known that. Where a public body seeks clarification, acts on its understanding of the clarification, invites follow-up if a requestor has a different view of the scope of the clarification, and the requestor does not follow-up, we cannot say that this constitutes a “denial” of a records request within the meaning of the public records law.

PPB has, effectively, treated the appeal of its prior response as a new records request.<sup>3</sup> In response it has now issued a fee estimate (including a partial public interest waiver) to proceed with a search of electronic records. There is no pending denied request for us to resolve.

*iii. Office of Management and Finance – Petition 19-47*

OMF has provided petitioner with quite a few responsive documents at no charge. After the June 12, 2019 meeting OMF indicated to petitioner that an electronic data search would be necessary to locate any additional responsive documents. In its July 3, 2019 message to petitioner, OMF stated that to perform such a search petitioner would need to specify the parameters of that search, to include search terms, date ranges, and accounts to be searched. Petitioner did not respond to that request for additional information and, 83 days later, filed the present appeal.

As discussed above, ORS 192.329(4)(a) provides that once 60 days have lapsed from a good faith request for clarification, “the public body shall close the request.” OMF’s obligation to further respond to this request was suspended on July 3, 2019 by its request for search terms and terminated on September 1, 2019.

Like PPB, OMF also reopened petitioner’s request in light of his appeal and issued a fee estimate. Because OMF was under no obligation to take further action as to the electronic search portion of the request after it asked for search terms and received no response, this “reopening” is a new request that has not, at present, been denied.

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<sup>3</sup> Or perhaps the City has interpreted the appeal as a statement under ORS 192.329(4)(a) that the requestor has “affirmatively decline[d] to provide that information or clarification.” Which it is not procedurally relevant to this petition as either would put the City back on the clock to either provide the records or issue a fee estimate.

**ORDER**

Petition 19-50, regarding the Auditor's Office, is denied because the Auditor properly responded to the request by identifying where versions of the responsive documents were already publicly available.

Petition 19-49, regarding the Portland Police Bureau, is denied. The request, as clarified, was not denied and the reopened request has likewise not been denied as a fee estimate is pending.

Petition 19-47, regarding the Office of Management and Finance, is denied. As to the only records OMF indicated it might possess but had not already provided (emails and their attachments), OMF's obligation to take further action was suspended by petitioner's failure to timely respond to a good faith request for information.

Very truly yours,



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ROD UNDERHILL

District Attorney

Multnomah County, Oregon

**19-47, 19-49, 19-50**