ROD UNDERHILL, District Attorney for Multnomah County
600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

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Alan Kessler
805 S.W. Broadway, Suite 1580
Portland, Oregon 97205

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

Re: Petition of Alan Kessler seeking various relief relating to a request for a native database export from the City of Portland's GovQA system

Dear Mr. Kessler and Ms. Johnston:

On November 27, 2019 Alan Kessler requested from the City of Portland the "full communication history for all public records matters in GovQA/WebQA." He further requested that the City provide those records in their native format, preferably as an "export from the underlying database."

GovQA is a private company that provides software and service to local governments for addressing public records requests. The City of Portland uses GovQA's software platform, also called "GovQA" to manage its obligations under the public records law. Requestors are required to submit their requests through GovQA, communications regarding fee estimates, clarification requests, and time estimates then all occur within GovQA. The records at issue are either provided or a denial communicated through the platform.

Here, after receiving petitioner's request, Ms. Wilton, a paralegal in the city attorney's office responsible for public record matters, communicated with GovQA to determine if it was possible to obtain this information. The City does not possess the in house ability to access the backend of the GovQA software in such a way that would allow it to run custom queries directly on the underlying database. GovQA tech support indicated, to the City, that they did not have "a system or custom report that could obtain this information," that no one had ever made such a request before, but that "it should be possible for our tech team to compile the data [...] for you."

After receiving this information from GovQA Ms. Wilton asked GovQA to begin work and then communicated with petitioner two items 1) that the City did not have the ability in house to bulk-export data from the GovQA database and 2) that GovQA was "work on getting me this information."

On December 17, 2019 Ms. Wilton again updated petitioner that she had yet to receive anything from GovQA and that it would be very laborious to fulfill this request with the tools available to the City. Ms. Wilton wrote, "I could perform this work manually but we have 78,727

requests in the system right now. I anticipate it would take on average 5 minutes to download the messages from each request and review them for exempt material. [...] Do you want an estimate for manually providing records?"

On December 23, 2019, after consulting with the deputy city attorney responsible for public records matters, Ms. Wilton changed course. She communicated with GovQA and requested that they cease work on the custom compilation request. In its response to this office, the City summarizes a subsequent phone conversation with GovQA as follows:

> GovQA informed [Ms. Wilton] that they did not have any existing reports that could be run to provide the information requested. Instead the "tech team" would have to create a way to compile the records which would be very time consuming. They indicated that no one had ever asked for this information before.

As a result, the City, on December 23, 2019, closed petitioner's request. Petitioner then filed this appeal.

DISCUSSION

A. Format of a records response – ORS 192.324(4)

First, it is not disputed that the City has the data that is the subject of this request. Nor is it disputed that the City has access to the data. What is disputed is what efforts the City must go to in order to access that data in an efficient manner or to provide the data in the format specified by a public records requestor.

ORS 192.324(4) requires an agency to provide electronically stored records in "the form requested, if available" and, if not so available, then "in the form in which the custodian maintains the record." ORS 192.324(4).

Here petitioner has requested electronically stored data in a specific format: an export of the data in bulk from the underlying database. The City has direct access to this data only in that it can export the message history from any individual case. As a result, the City has estimated that it will take 6,560 hours of work to provide the records. Based on the City's initial communication with GovQA it appears that GovQA believed it was within its ability to customize a report and generate a bulk export of its database to respond to petitioner's request.

The question then, does GovQA's willingness to pursue compiling this data make that format "available" within the meaning of ORS 192.324(4). We have previously written that "available" does not mean "capable of being created." *Petition of Kessler*, MCDA PRO 18-35 (2019). See also, *Alan Kessler v. City of Portland*, Mult. Co. Cir. Ct. 18CV43134, Opinion and Order (Russell, J.) (finding this conclusion "not erroneous.")

Here assuming, as is likely, that GovQA possesses the technical capacity to compile the data in the format petitioner has requested and also assuming that GovQA is the City's agent for these purposes, our decision in *Kessler* (18-35) still compels the conclusion that the specific

compilation requested by petition is not "available" within the meaning of the public records law.[1]

The City must then provide petitioner with the record in the format in which it "maintains" it. ORS 192.324(3). "Maintains" as literally defined is of little help in the context of a database. The software used to interface with the raw data in a database is exempt under the public records law, and the literal binary data is of little utility without the ability to decode it.[2] See ORS 192.345(15); *Petition of Marguilies*, MCDA PRO 19-61 (2019). Thus, in the context of databases the only construction of "maintains" that gives it meaning is that the public body "maintains" the data in the format that the systems and processes by which the public body accesses the database for its own purposes report the data. In this case that is an individual export of any single message history in either CSV or PDF format.

B. Timeliness of response – 192.329(5)

Petitioner has additionally asserted that the City has violated the timeliness requirements of ORS 192.329(5), which requires that the City either complete its response to a public records request, or provide a written estimate of when it reasonably expects to, within 15 business days. Here petitioner made his request on November 27, 2019. The City denied his request on December 23, 2019 (though appears not to have actually communicated that to petitioner who learned of it on December 26, 2019). This is 19 business days, which is in excess of the 15 days required by law.

In that intervening time, the City communicated with petitioner that 1) it was working with GovQA to get the full database export, and 2) that to do the work manually would take over 6,500 hours, and then 3) that his request was closed. Per the City, once lawyer staff became aware of and involved in the request, the work with GovQA ceased as the City's position was that it did not have to generate new compilations at petitioner's request. The City had, on December 17, the 15th business day, asked petitioner if he would like an estimate to proceed with the manual work. Petitioner did not specifically respond to this request presumably because he believed that work was ongoing towards the full database export (which it was at that time) and because the costs associated with the manual export would be so large as to be not worth discussing.[3]

The City did not give a permissible response identified in ORS 192.329(2) within 15 business days. The only arguable savings is that the City did provide a time (though not cost)

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[1] The concept of "software as service" provides challenges that the public records law was never intended, and is ill-equipped, to address. We have done our best to construe the statutory language in a fashion that gives them effect as intended, however legislative action in this area would well-serve all involved in such disputes moving forward.

[2] Of some relevance, petitioner has not requested "all the data" in the GovQA database, he has requested a specific subset: all "communication histories."

[3] Indeed the City's cost estimate provided to petitioner after the commencement of this litigation, suggests a total cost in excess of $400,000 to generate and review each of the 78,727 entries.

estimate on the 15th day and inquired if petitioner really wanted to proceed down that path. This was a legitimate, and good faith, question at the time it was asked.

Where the City failed was, once it decided to cease work on the GovQA approach to the request, it never circled back and completed its response to the original request, which was still outstanding. The context of the question on December 17, was "there are two paths to this question, do you also want us to work on the expensive one also?" On December 23, 2019 the context had changed to "do you still want a response to your public records request?" These are very different questions, and to the extent that petitioner implicitly answered the question on December 17 by his silence, that cannot also be read, in the unique context of this request, to imply that *if the full export were not available* that he did not want to at least get an estimate for the manual export.

Thus, the City's final response (to close the request) was four business days late. Where we have found that an agency has violated the timeliness provisions of ORS 192.324(4) we then must determine whether or not to exercise our discretion to order any remedial measures.

C. Remedial Measures – ORS 192.407(3)

ORS 192.407(3) provides that, when an agency has not complied with the provisions of ORS 192.329(5), this office may require disclosure of nonexempt material responsive to the request within whatever period we deem appropriate, may impose a $200 penalty, and/or may order a fee waiver or reduction.

Having determined, as a legal matter, that the City was correct that it was not obligated to have GovQA generate a novel compilation on its behalf, that leaves a four day delay in closing a request. We understand petitioner's frustration that he believed himself to be working in good faith towards a solution only to have the City dramatically change its position midway through the process. Likewise, he has an understandable frustration that the City could pursue a course of action that might result in him getting a full database export at a reasonable cost, but has elected not to.[4] The City changing its mind on the legal import of facts part way through the process is not, however, sanctionable.

Further, it is not clear that the cost estimated by the City is predominantly to *gather* the records as opposed to *review* of the records. Although petitioner points out that there is no need for an accomplished paralegal to repeatedly click a mouse to gather the records (which is certainly true under the reasoning of *Kessler v. City of Portland*, supra), ORS 192.324(4)(b) expressly authorizes passing on the costs for an attorney to *review* records prior to production. And a city is not required to provide direct access to its raw data if the manner in which it is made available makes it impossible for the City to segregate out exempt material. *Petition of Kelley*, Att'y Gen PRO (May 10, 1996) (denying direct access to DMV database). Thus, even if

[4] The City asserts that notwithstanding its direction to GovQA to cease working on the compilation, it nonetheless requested information from GovQA as to whether it actually could complete that work and what, if any, cost would be associated with that work for the City. The City tells us that it has yet to receive a response to this request.

the City continued to pursue having GovQA generate a custom report to respond to petitioner's inquiry, there could still be a substantial cost associated with the review of those records.

All that is to say, the violation we have found is a four day delay and any remedial measure must be proportionate to that violation. We also look to the public interest involved in the underlying request to guide our discretion as to the propriety of sanctions. Other than the interest in government transparency that is present in every public records case, we do not see a public interest that has been impeded by the City's delay in this case.

Subsequent to the filing of this appeal, the City reopened petitioner's request and provided him with an estimate to proceed with work, specifically a "first batch" of 180 communication histories for $1,109.77, to be provided within 25 business days of payment. Petitioner objects that this fee estimate is only for a minute fraction of the total work and is thus, insufficient to constitute a proper response to his request. We disagree on that front; basic mathematics easily converts this staged estimate into a full estimate. And a staged estimate such as this is in everyone's interest as a rolling production of a massive request will result in more rapid receipt of records.[5]

That said, we do question under ORS 192.407(1)(b), the timeline involved. As petitioner correctly observes, this time estimate will result in the City not completing its response for 42 years. The City estimated five minutes of work for each communication record. For the initial 180 record batch, this means 15 hours of work. Five working weeks is excessive to perform 15 hours of work. Assuming payment, this pace would involve processing only 156 records per month. This is an order of magnitude slower than we ordered in a previous massive documents case. *Petition of Buchal*, MCDA PRO 18-38 (2018) (ordering production of 2,500 emails per month on a rolling basis).

We recognize that the City almost certainly lacks the present capacity to produce records at that rate with current staffing while also meeting other obligations, but, as we discussed at length in *Buchal*, that is of little relevance under the public records law. Provided the costs are covered, an agency can, and indeed must, bring on staff or outsource work in order to meet its obligation to respond "as soon as practicable and without unreasonable delay." ORS 192.329(1) Accepting that more work is involved in this instance to collect and review, as opposed to just review as in *Buchal*, we think a rolling production of 1,500 records per month would be appropriate.

We recognize that this schedule is both somewhat arbitrary and also likely academic. It is unlikely that petitioner will pay over $400,000 for this work to be completed. However, that a fee is, practically, a barrier to access does not make it any less the City's "actual cost."

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[5] Consistent with our precedent, we express no opinion on whether or not the five minutes per record estimate or the cost attributed to those five minutes are the City's "actual cost." *Petition of Jeff Merrick*, MCDA PRO 17-35 (2017).

ORDER

Accordingly, the petition is denied except that the City shall, upon payment of fees, produce records on a rolling basis of 1,500 per month as opposed to the 156 per month currently projected.

Very truly yours,

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

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