



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

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

March 10, 2020

Chris May  
chmay@protonmail.com (by email only)

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

Re: Petition of Chris May challenging the denial of a complete fee waiver by Portland Public Schools

Dear Mr. May and Ms. Kane:

In his public records petition, dated February 28, 2020, Mr. May asks this office to order the Portland Public School District (PPS) to grant him a full waiver of fees in relation to a public records request for the middle names of all of its school bus drivers. Petitioner had previously requested a list of the “full names and hire dates” of all PPS school bus drivers. PPS provided him with a list of 99 bus drivers, with first and last name as well as their date of hire.

Petitioner then followed up with a request for the middle names. PPS informed petitioner that the PPS human resources database only recorded middle initials and that they would either need to generate a one-time query, to pull just the middle initials, or gather information manually to compile a list with full middle names. Because of the work involved, PPS informed petitioner that there would likely be a fee associated with this portion of the request.

Petitioner then requested a fee waiver. At PPS’ request petitioner provided information indicating that he was seeking information to verify the driving records of PPS school bus drivers. After evaluating that information, PPS issued a fee estimate that included a 50% public interest fee reduction. Petitioner then indicated that he would accept birth dates or birth years for the drivers, apparently in lieu of middle names, as an identifier to distinguish between individuals with the same first and last name that might appear in records checks. At this point PPS denied this portion of the request because petitioner has not complied with ORS 192.363.

For the reasons discussed below we deny the petition.

### 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). PPS 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. PPS estimates that burden at two hours for just middle initials or just over eight hours for full middle names.<sup>1</sup>

Here PPS has agreed that there is a public interest in the records as evidenced by it granting a 50% fee waiver, which is certainly “substantial” under ORS 192.324(5). The dispute then is whether or not PPS abused its discretion in declining to grant a *full* fee waiver. Here PPS provided petitioner with two estimates: one for middle initials only and one for full middle names. After the partial waivers, the former was estimated at \$45 and the later at \$144.38.<sup>2</sup>

PPS further argues that petitioner’s stated de-confliction public interest argument is hypothetical at best. Petitioner has identified one individual on the list provided who could, either, have a single old speeding ticket, or have an extensive traffic record including an active warrant for DUII. PPS responds that the fact that one of its drivers has a traffic infraction over a decade old is of insignificant public interest. With only a single identified example where de-confliction would be of compelling interest (which PPS has effectively de-conflicted by its response to this petition), and applying the deferential standard of review in ORS 192.324(6), we conclude that PPS’ fee waiver decision in this case is within the range of legally permissible options under ORS 192.324(5).

#### B. Public Employee Personal Information – ORS 192.355(3)/192.363

Petitioner has additionally appealed the denial of his request for birth dates for each driver as a separate source of de-conflicting records. ORS 192.355(3) provides that, among other

---

<sup>1</sup> Consistent with our precedent, we may not, and do not, express any opinion on the accuracy of these estimates. *Petition of Babcock*, MCDA PRO 15-22 (2015).

<sup>2</sup> In its communications with petitioner PPS has consistently expressed a willingness to compile the required information. However, in evaluating the decision to grant or deny a full fee waiver, it is relevant that PPS is likely not required to create this record (a list of school bus drivers, inclusive of their middle names) if, as seems likely, it does not already exist. See *Petition of Floum*, MCDA PRO 17-36 (2017) (holding that the City of Portland was not required to aggregate data from different sources to provide requested information about each city employee in a specified format).

Page 3  
March 10, 2020  
Petition of Chris May

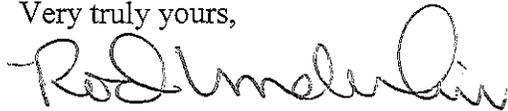
things, the dates of birth of public employees are exempt from public disclosure unless 1) the requestor follows the procedural requirements in ORS 192.363 and 2) the public interest, by clear and convincing evidence, requires release.

ORS 192.363 states that, for each employee whose information is sought, a requestor must submit a statement demonstrating, as to that employee, why the public interest requires disclosure. Petitioner has not submitted any such individualized statement to PPS and, as such, ORS 192.363(6) prohibits PPS from releasing any record that contains this information.

**ORDER**

Accordingly, the petition is denied.

Very truly yours,

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

ROD UNDERHILL

District Attorney

Multnomah County, Oregon

20-08