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April 24, 2020

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 a full export of the City of Portland's GovQA database

Dear Mr. Kessler and Ms. Johnston:

In his public records petition, dated April 8, 2020 petitioner, Alan Kessler, has appealed under the public records law asserting that the City of Portland has denied his request for: "all of the data in the GovQA database or databases that contain communications between public records requestors and the City of Portland on public records requests."

GovQA is the software that the City uses, under contract, to manage public records requests it receives. The procedural history of this request is somewhat convoluted, but ultimately irrelevant to our disposition.¹ The City's position on the merits is that, short of terminating its contract with GovQA, which it does not intend to do, it has no ability to access the record that petitioner has requested.

This request is a follow-up to one that we previously addressed in, *Petition of Kessler*, MCDA PRO 19-63 (2020). In *Kessler* (19-63) petitioner had requested an export of the full communication history for all requests in the GovQA database. In that opinion we outlined a back-and-forth as petitioner and the City and the City and GovQA engaged in parallel conversations in attempt to determine a path to complete that request. In the end, the City provided a cost estimate to manually provide the communication data using tools available to the City. GovQA, although expressing an initial willingness to work on a custom export for the City, was slow to respond and eventually the City eventually asked them to cease work on that task. We concluded that the City did not possess the record at issue in the form requested, nor was it able to format the record as requested by petitioner and, as such, was not obligated to provide it. However, we stated in a footnote "[o]f some relevance, petitioner has not requested 'all the data' in the GovQA database, he has requested a specific subset: all 'communication histories.'" *Id.* at n.2.

¹ To the extent petitioner is asserting a breach of contract with the City, as the City's reply suggests he is, we do not have the authority to consider such claims and do not address them further.

Shortly after we issued that order, petitioner filed the records request at issue here for “all the data” consistent with the language presented in footnote 2. As discussed below, we conclude that, consistent with *Kessler* (19-63), the City is only required to produce records to which it has actual or constructive access. The factual record here indicates that the City does not have such access to the specific record requested here.

DISCUSSION

ORS 192.324 provides that on receipt of a properly formatted records request a public body must either provide “[a] copy of the public record if the public record is of a nature permitting copying; or [a] reasonable opportunity to inspect or copy the public record.”

We recognize that at the time the public records law was enacted, the present pervasiveness of databases as a means of storing public information could not have been foreseen. Nonetheless we are left attempting to map these statutes onto existing realities until such time as the law is updated. On the facts presented here, the City of Portland cannot permit a reasonable opportunity to inspect because it does not, itself, possess the level of access necessary to accomplish this. Nor, based on the nature of the contract and contacts between the City and GovQA, is the record (i.e. the entire database) “of a nature permitting copying.”²

Put another way, the public records law does not require the production of records to which a public body does not have actual or constructive access. See, *Petition of Shepherd*, MCDA PRO 98-21 (1998) (quoting *Hovies v. Portland*, 97-03-02222, Opinion and Order (Marcus, J.)); *Petition of PETA*, MCDA PRO 19-03 (2019). To be clear, the public records law does apply to all of the data contained in that database, which the City must provide (if not otherwise exempt) to a requestor to the extent it is able with the processes that it regularly uses to access that data for its own purposes.

In *Kessler* (19-63) we held that a “public body ‘maintains’ the data [in a database] in the format that the systems and processes by which the public body accesses the database for its own purposes report the data.” Footnote 2 in that opinion did leave open the possibility of a different result when presented with a database records request that did not require tailoring or formatting. However, having fully considered the question, we reach the same result as to a request for the full database.

The only practical way that the City has to obtain access to this record is to terminate its contract with GovQA, at which point GovQA is obligated (for a fee) to provide that export to the City. We do not interpret access that requires such drastic steps to be “constructive access” as Judge Marcus used that term in his *Hovies v. Portland* opinion or as adopted by our subsequent decisions.

² We recognize of course that the literal binary data file underlying the database may be copied by a person with appropriate access, rather we refer to the practicalities of the City’s ability to copy that data.

ORDER

Accordingly, the petition is denied.

Very truly yours,



ROD UNDERHILL
District Attorney
Multnomah County, Oregon