



MIKE SCHMIDT, District Attorney for Multnomah County

1021 SW 4th Ave., 600 County Courthouse • Portland, Oregon 97204 • 503 988-3162 • FAX 503 988-3643
www.mcda.us

August 26, 2020

Erik Gunderson
Gunderson Employment Law
1050 S.W. Sixth Ave., 11th Floor
Portland, Oregon 97204-1136

Raghav Shanmugasundaram
OHSU Legal Department
3181 S.W. Sam Jackson Park Rd.
Portland, Oregon 97239

Re: Petition of Erik Gunderson requesting a determination of undue delay

Dear Mr. Gunderson and Mr. Shanmugasundaram:

In his public records appeal dated July 21, 2020, petitioner Erik Gunderson asks this office to order Oregon Health & Science University (OHSU) to complete its response to his request in a timely manner. Petitioner's records request contains 10 individual categories of records primarily dating from 2017 to the present date. These categories can be broadly summarized as policies for the response to and prevention of assaults against OHSU personnel, training materials relating to preventing and responding to violence against OHSU personnel, training attendance records, and reports of assaults involving OHSU personnel.

Petitioner submitted his initial request for records to OHSU in a letter dated February 21, 2020. According to the petitioner, and without contradiction by OHSU, he received no response from OHSU until May 21¹. On June 11, OHSU again acknowledged receipt of petitioner's records request and agreed to provide petitioner an estimate of time and fees "within a reasonable time." On June 23, OHSU informed petitioner that it estimated the task of retrieving and reviewing responsive documents to require approximately 30 hours of staff time.

¹ In its response to the petition, OHSU says that their Public Records Department did not receive petitioner's request until June and that the delay was due to the petition being "misrouted or otherwise delayed due to our Public Records department working offsite since the start of the COVID-19 pandemic." The record contains an email from a legal assistant from OHSU's legal department that indicates their receipt of the public records request as early as May 21.

Upon the petitioner's request for the time estimate to be broken down and specified toward each of his 10 individual records requests, OHSU responded with a revised estimate of 340 hours to retrieve and review responsive documents. On June 26 petitioner attempted to limit the scope of his requests and therefore reduce the demands on OHSU staff by refining the terms used in his records requests. In the same correspondence, petitioner requested a cost estimate. OHSU agreed to provide a detailed response by July 3. OHSU later revised its timeline for response to July 10, citing the July 4th holiday and other calendar conflicts. On July 20, OHSU had still not provided a cost estimate but "hope[d] to get this detailed email to you soon."

Because OHSU has failed to adequately respond to petitioner's public records request as required by ORS 192.329, either by producing the requested records or tendering a fee estimate to petitioner, at any time in more than 200 days since petitioner submitted his request, we find that there has been undue delay and grant the petition.

DISCUSSION

A. Unreasonable Delay – ORS 192.329

Once a public body has received and acknowledged a public records request, ORS 192.329(5) establishes a deadline of 15 business days as a baseline for responding to that request. The ways in which a public body is considered to have completed its response to the request are laid out in ORS 192.329(2) and include the following:

- Providing access to or copies of all non-exempt records, or explaining where such records are publically available;
- Citing exemptions upon which responsive records are being withheld;
- Explaining that the public agency is not the custodian of the requested records; or
- Citing federal or state law that prohibits the agency from acknowledging the existence of requested records.

ORS 192.329(1) provides that:

A public body shall complete its response to a written public records request that is received by an individual identified in the public body's procedure described in ORS 192.324 as soon as practicable and without unreasonable delay.

ORS 192.329(3) allows for suspension of a public body's response obligations as follows:

If a public body has informed a requester of a fee permitted under ORS 192.324(4), the obligation of the public body to complete its response to the request is suspended until the requester has paid the fee, the fee has been waived by the public body pursuant to ORS 192.324 (5) or the fee otherwise has been ordered waived.

In reviewing the record before us, there is no evidence that OHSU has fulfilled its obligation to respond to the petitioner's request. OHSU has provided no responsive documents, offered no explanation for exemption or legal barrier to disclosure, has not provided an actual estimate of fees to produce responsive documents, or in any other way completed its response under ORS 192.329(2). It is true that OHSU has provided varying estimates of staff time that will be necessary to complete its response to petitioner's request. But an estimate of time without a corresponding hourly rate gives petitioner only a rough basis on which he can guess at the dollar amount to be charged.

In its August 5, 2020 response to the petitioner's appeal, OHSU provided its most recent estimate of time required for each of petitioner's 10 records requests, reducing its overall estimate of time to review documents to 321 hours. That response explained in a broad sense why certain requests would take longer to review than might be expected. However, OHSU has provided no explanation why it has been unable to provide a cost estimate to correspond with its time estimate other than to point out that multiple departments would need to be queried.

The fact that multiple departments would be required to search for and review documents does not explain why a cost estimate could not have been provided in a timely manner. Clearly OHSU had enough information about the scope of work that it was able to provide an estimate of time that would be required to complete it. There is no cognizable reason why that time estimate could not have been translated into a cost estimate for petitioner to consider and either pay or appeal.

Petitioner's request for public records had been pending for 215 days when he filed this petition on July 21, 2020. Even if we put aside the time during which OHSU states that the records request was misrouted or otherwise delayed due to COVID-19 restrictions, OHSU's legal and public records departments acknowledged receipt of the request on June 8 but had not provided petitioner with a concrete cost estimate by the time he filed his petition some 43 days later. Furthermore, OHSU's official response to this petition on August 5 still provided no cost estimate.

OHSU has provided no explanation – and no reasonable explanation can be inferred from the record – for its delay in providing petitioner with a fee estimate in a timely manner. Accordingly, we find that its failure to provide a fee estimate in the time since receiving petitioner's records request – regardless whether that is calculated from February, May, or June – constitutes an unreasonable delay under ORS 192.329.

B. Penalty for Undue Delay ORS 192.407

August 25, 2020
Petition of Erik Gunderson

ORS 192.407 provides that upon granting a records request petition based on undue delay, the District Attorney may order that the public body either pay a \$200 penalty to the requester or provide the requester a fee waiver or fee reduction. Because the amount of fees remains unknown to petitioner and the District Attorney, it is not yet clear whether and to what extent an order reducing or waiving such fees would be appropriate. Given the significant, and unexplained, delay we do find that exercise of our discretion to impose a sanction under ORS 192.407 is appropriate. OHSU has seven days from the date of this order to provide petitioner with a fee estimate for his request. At that time, if there remains a dispute, my office will determine what form of financial penalty we will impose once the fee amounts are clear and the parties have been given an opportunity to discuss any voluntary reduction or waiver.

ORDER

For the reasons stated above, the petition is granted. OHSU shall provide a fee estimate to petitioner within 7 days of the date of this order. Jurisdiction is retained with the District Attorney to assess any appropriate penalty. The parties shall provide additional information or argument on the issue of a penalty no later than 30 days from the date of this order.

Regards,



MIKE SCHMIDT
District Attorney
Multnomah County, Oregon

Notice to Public Agency

Pursuant to ORS 192.411, 192.415, and 192.431(3) your agency may become liable to pay petitioner's attorney's fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within seven days formal of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.

20-29