



**MIKE SCHMIDT**, District Attorney for Multnomah County

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August 28, 2020

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

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

Re: Petition of Alan Kessler challenging redaction of public employee personal phone numbers from text messages released under the public records law

Dear Mr. Kessler and Ms. Johnston:

Mr. Kessler has filed a public records appeal with this office challenging certain redactions, and associated fees, made by the City of Portland to its response to his public records request for:

All text messages sent or received by the Mayor and/or his staff from 12:01AM on February 17, 2020 through 11:59PM on February 19.

The City of Portland provided petitioner with the records he sought, but redacted personal phone numbers of city employees that appeared in those records pursuant to ORS 192.355(3). Petitioner asserts that those redactions, as well as the fees associated with applying them, were improper.

## **DISCUSSION**

### **A. Elected Officials – ORS 192.427**

ORS 192.427 provides that when a public record is in the custody of an elected official “no petition to require disclosure may be filed with the [...] district attorney.” This is jurisdictional, and may not be waived. We have interpreted “custody” to include archived email.

Although an archived email is not in the literal custody of a school board member, the way a cell phone might be, the legislative purpose behind ORS [192.427] is clear: to avoid conflict between the attorney general or district attorney and other elected officials within their jurisdictions. Minutes, Joint Committee on Professional Responsibility, HB 2157/SB 15 (Apr. 16, 1973). There is no question to us that an elected official who had an assistant file a letter in a filing cabinet would still be in “custody” of that letter despite the fact that he or she might not know its exact location or be able to retrieve it without that same assistant’s help. In a modern office environment the letter has largely been replaced by the email,

and the file cabinet by the computer server. Those changes in technology do not alter the essential nature of who has “custody” of that record for purposes of ORS [192.427]. Emails generated by or sent to an elected official, as they are retained by his or her agency, remain in the official’s custody for purposes of ORS [192.427].<sup>1</sup>

*Petition of Wright*, MCDA PRO 16-29 (2016). We see no basis to distinguish the archiving of text messages from that of emails. Indeed, as we wrote in *Wright*, ORS 192.427 “prohibits us from considering a public records petition relating to text messages of school board members.” *Id.* at 2. The jurisdictional force of ORS 192.427 extends to an elected official’s immediate staff as well. *Petition of Tierney*, MCDA PRO 15-15 (2015) (records from the Office of the Mayor are in the Mayor’s custody for purposes of ORS 192.427).

**ORDER**

Accordingly, the petition is dismissed for lack of jurisdiction.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Schmidt". The signature is fluid and cursive, with a large initial "M" and "S".

MIKE SCHMIDT  
District Attorney  
Multnomah County, Oregon

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<sup>1</sup> ORS 192.480 was renumbered to ORS 192.427 in 2017 without substantive amendment. The quoted text references 192.480 in the original.