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August 18, 2020

Jake Dockter (by email only)

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

Re: Petition of Jake Dockter seeking an order compelling the Portland Police Bureau to respond to two record requests relating to certain internal communications

Dear Mr. Dockter and Ms. Plaza:

Mr. Dockter filed a public records appeal with this office challenging the Portland Police Bureau's (PPB) failure to timely respond to two public records requests. On June 15, 2020 petitioner submitted a request to PPB for three categories of records:

- 1) A copy of any and all directives Chief Resch or other leadership made to PPB directing them to cover their names.
- 2) Information about the reports that officers had been doxxed Who? What occurred? Please provide a report about these incidents.
- 3) A copy of any and all directives related to identification disclosure and display of names or identifying numbers.

On June 17, 2020 petitioner made a second request for:

[A]ll documentation, including emails sent to Chief Resch that include the terms: doxing, doxed, doxing, doxed.

Petitioner additionally sought fee waivers as to both requests.

A. June 15 Request

PPB acknowledged the June 15, 2020 request the same day with a form response asking for more information in support of the fee waiver request. PPB additionally informed petitioner that due to ongoing public health situation and the resulting unavailability of key staff, the statutory timelines for responding to public records requests would not be met. In support of this PPB cited ORS 192.329(6), the "safety valve" for extraordinary circumstances.

On July 20, 2020, the same day petitioner filed this appeal, PPB made its response to the June 15 request. As to the first item, PPB provided a copy of a June 6, 2020 email memorandum from Commander Erica Hurley (the "Hurley memo"). As to the second item, PPB responded that this was a question it was not required by the public records law to answer. As to the last, PPB referred petitioner to the publicly available webpage containing all PPB directives.

As this appeal was pending, the parties engaged in some discussion regarding these responses. Petitioner, for his part, indicated that the Hurley memo was not sufficient to satisfy the intent behind his first request, which, he elaborated, included “documents containing orders, commands, directions, informal directives, policies or other permission or instructions to PPB personnel relieving them of the requirements to identify themselves orally, by providing business cards upon request and/or by wearing their names and/or badge numbers on their uniform.” He also clarified that, as to the second part, he was not asking PPB to support a claim, rather he was seeking “any report that describes any of the alleged doxxing events.”

PPB in turn maintained its position that petitioner was impermissibly (and substantially) expanding the scope of his request as to item one, relating to “directives.” However, PPB did agree to reopen the request on the second item and has provided petitioner with a fee estimate to search PPB reports for the term “doxxing.”¹

B. June 17 Request

As to the June 17, 2020 request, PPB promptly sent the same automated response as to the June 15 request described above. Subsequent to petitioner initiating this appeal, on July 27 PPB provided petitioner with a fee estimate to conduct the email search and granted a 25% fee waiver in light of the public interest.

PPB has explained in its submission that the timeline for processing this matter had nothing to do with the initiation of this proceeding. Rather, on the date this petition was filed, PPB was processing records requests from the public dated June 5. While this matter was pending, PPB worked its way to requests made the week of June 15 and began its work on petitioner’s matter.

The requested relief as to the June 17 request is to evaluate the City’s non-compliance with the timelines set out in ORS 192.329 and order them to promptly process petitioner’s request. As the City has now done what petitioner asked us to order it to do as to this request, the matter is moot.

We turn then to legal analysis of the disputed portions of PPB’s response to the June 15 request.

DISCUSSION

A. Timeliness – 192.329(5)

ORS 192.329(5) provides that,

¹ The Public Records law does not require absolute specificity nor, unless unambiguously required by statute, require a requestor to provide information that cannot be known to the requestor. Here the request for “the reports that officers had been doxed,” although not phrased in the most precise manner, reasonably should have put PPB on notice that petitioner sought police reports about officers being doxed. PPB appears to have ultimately reached this same conclusion, so we do not address the matter further.

As soon as reasonably possible but not later than 10 business days after the date by which a public body is required to acknowledge receipt of the request under ORS 192.324, a public body shall:

- (a) Complete its response to the public records request; or
- (b) Provide a written statement that the public body is still processing the request and a reasonable estimated date by which the public body expects to complete its response based on the information currently available.

ORS 192.329(6) further provides,

The time periods established by ORS 192.324 and subsection (5) of this section do not apply to a public body if compliance would be impracticable because:

- (a) The staff or volunteers necessary to complete a response to the public records request are unavailable;
- (b) Compliance would demonstrably impede the public body's ability to perform other necessary services; or
- (c) Of the volume of public records requests being simultaneously processed by the public body.

As its initial response anticipated, PPB did not meet the 15 business day deadline in ORS 192.329(5). Rather PPB argues that the extraordinary circumstances presented by the concurrent state of emergency caused by the COVID-19 pandemic and the ongoing public demonstrations in this community for the last two months have triggered the safety valve provisions in ORS 192.329(6)(a) and (b). We agree.

If the timeline in ORS 192.329(5) does not apply, as we have concluded here, an agency is then bound to complete its response to a public records request "as soon as practicable and without unreasonable delay." ORS 192.329(1). Given the unprecedented circumstances the City of Portland currently finds itself in the delay in these cases, about a month and half, is not so extreme that we can find it "unreasonable" within the meaning of this section.

B. Scope of Request

In the disputed portion of petitioner's June 15, 2020 request he initially requested "directives." Counsel for PPB has explained that, internally to PPB "directive" is a term of art that references formally adopted policies, rules and procedures. All PPB directives are available publicly on its website. PPB explains that although it could have limited its response to formal directives, which is what petitioner (knowingly or inadvertently) had requested, it expanded the scope of request on its own to also include "orders," which may be more informal than directives. The Hurley memorandum is an "order" but not a "directive."

Here, petitioner asked for directives, PPB made a reasonable interpretation of that request and provided him with a responsive record. Given the wording of the request and the contextual information provided by PPB we agree that its interpretation of the scope of "directives" was

reasonable. That, in turn, means that the expansion of the request from “directives” to “documents containing orders, commands, directions, informal directives, policies or other permission or instructions to PPB personnel” constituted a new records request, which was not made in accordance with PPB’s published procedure.

Where a petition is filed alleging that a public body has failed to respond to a particular public records request, we may only review it if the request was made in accordance with the public body’s published policy. ORS 192.407. Here, the initial June 15 request was made through that procedure; the subsequent expansion was not, thus we do not have the authority to review it. The distinction between a “clarification” and an “expansion” is necessarily fact-specific, and in the absence of further direction from the courts or legislature we have applied an “objective reasonableness” standard to a public body’s assessment of the scope of a request that it is obligated to respond to.²

ORDER

Accordingly, the petition is denied as moot as to the timeliness issues. As to the dispute about the scope of “directives,” we agree with PPB that its interpretation of the term “directive” was reasonable under the circumstances and, accordingly, we do not have statutory authority to review a petition seeking disclosure of additional materials out of that request.³

Very truly yours,



MIKE SCHMIDT
District Attorney
Multnomah County, Oregon

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² We do note, and appreciate, that it appears PPB and petitioner, despite the disagreement on the “directives” issue, have been working towards resolution of the majority of the issues raised in the initial appeal, many of which have already been resolved without the need for an order.

³ This should not be taken as a comment on whether or not the more expansive set of records sought by petitioner is subject to release, only that they are not properly part of a request for “directives.” Petitioner is free to make a new request for those additional materials.