



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

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November 23, 2020

Linda Nezbeda  
Lindanezbeda@aol.com

Mary Kane  
Office of the General Counsel  
Portland Public Schools  
501 North Dixon Street  
Portland, Oregon 97227

Re: Petition of Linda Nezbeda - determination of appropriate sanction for undue delay

Dear Ms. Nezbeda and Ms. Kane:

Petitioner Linda Nezbeda has made two requests for public records from Portland Public Schools (PPS) that are the subject of this appeal, dated September 23, 2020. Her first request (PRR 2021-006, filed on July 16, 2020) sought “all communications via email and text messages<sup>1</sup> involving Sharon Reese and Liz Large respectively between the dates of April 13<sup>th</sup> through April 19<sup>th</sup>, 2020.” On August 12, 2020, in the midst of discussions regarding the scope and cost of that request, petitioner made a subsequent request (PRR 2021-019) for documents relating to the names of “attorneys from the Office of General Counsel Network [that] have been actively used by [PPS]” from January 2019 to August 12, 2020 and “all law firms [PPS] is contracted with as of August 12<sup>th</sup>, 2020 (including copies of contracts).”

The procedural history of this matter is lengthy and well known to the parties. As such we will not recite it in full here, but rather focus on the essential details. PPS acknowledged receipt of petitioner’s request on July 20, 2020, four days after its submission, and projected that they would be able to provide an update on the progress of an initial inquiry within fifteen working days. On August 11, 2020, PPS provided petitioner with a cost estimate of \$956.25 for reviewing and producing the approximately 2,025 responsive documents. Petitioner informed PPS that she mailed a check for that amount the next day. Due to the errant delivery of the check to the wrong department and minimal staffing at various PPS facilities as a precaution against spreading the COVID-19 virus, the check was not received by the Accounts Receivable department until September 21, 2020, at which time PPS informed petitioner that payment had been received and they would begin reviewing documents for production to her<sup>2</sup>. PPS informs us they have delivered two batches of documents to petitioner as of November 4, 2020. They have pointed to their Public Records Officer being on a reduced schedule as the reason for the delay in completing review and production of these documents.

PPS acknowledged petitioner’s second request (PRR 2021-019) on August 12, 2020. In that acknowledgement, a PPS public records official stated that he could fulfill the request rapidly and would agree to waive any fee associated with this request. PPS reports that shortly after this exchange with

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<sup>1</sup> Petitioner later agreed to drop her request for text messages based on the fee estimate.

<sup>2</sup> Petitioner asserts that “PPS is retaliating against me in not acknowledging my payment and using [Request 2021-019] as leverage.” This allegation of bad faith against PPS was not developed or explained any further in petitioner’s appeal and in our review of the submitted correspondence between the parties, we find no evidence to support it. We therefore give it no weight in our decision.

petitioner, that employee went on paternity leave earlier than expected before completing the task. This apparently caused a delay in completing the response to the records request until October 1, 2020.

While we find that PPS did not fulfill its obligation to respond to petitioner's requests in a timely manner, PPS has explained the reasons for these delays and we have no basis in evidence to discredit those reasons. Given all of the available information, we find that the 50% and 100% fee reductions that PPS voluntarily granted for petitioner's first and second records requests respectively are equal to or greater than any penalty that would be reasonable if we were to exercise our discretion to impose one. As such, petitioner's appeal is denied.

### DISCUSSION

Once a public body has received a public records request, ORS 192.329(5) establishes a deadline of 15 business days as a baseline for responding to that request. ORS 192.329(3) provides that,

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.

Notwithstanding the 15 business day timeline, a public body is required to complete its response to a public records request "as soon as practicable and without unreasonable delay." ORS 192.329(1). If it is established that a public body has failed to complete its response in a timely manner under ORS 192.329, this office is empowered to order a fine, fee waiver, or fee reduction as penalty.

Petitioner has asked this office to "issue an order to Portland Public Schools to reduce and/or waive any fees and to immediately release the responsive records" as sanction for what she argues is PPS's undue delay and "fail[ure] to respond to the request in the time and manner prescribed in ORS 192.329." PPS provided a cost estimate for petitioner's request for emails (PRR 2021-006) 17 days after its receipt. Upon their discovery of petitioner's misrouted check on September 21, 2020, PPS informed petitioner that they had begun reviewing the responsive documents for any necessary redactions or exemptions. On October 26, 2020, PPS delivered its first batch of requested emails amounting to 1,100 pages to petitioner. PPS provided a second batch of emails to petitioner on November 4, 2020, and the final batch on November 20, 2020, completing production of more than 4,000 pages<sup>3</sup>.

As an initial matter, PPS did not meet the 15 business day requirement to provide a cost estimate or substantive response to the email request pursuant to ORS 192.329(5). While a two-day delay in providing the fee estimate is relatively minimal, PPS has provided no explanation and none is apparent to us.

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<sup>3</sup> PPS has reported that they have "a dozen or so outstanding emails" that have not yet been delivered to petitioner. They have explained that these emails may require redaction based on unanticipated "complex legal issues" that require more research on their part before final production. PPS anticipates delivery of these outstanding documents by December 1, 2020.

After providing the estimate for the email request, the timeline for providing the documents was suspended until PPS received their fee. The receipt of the fee paid by petitioner was apparently delayed due to the fact that the check was delivered to the wrong department and that that department had no staff on site to redirect it. This lack of staffing was in response to state and local government guidance to reduce the spread of the COVID-19 virus. Though it is not necessary to decide in this matter for reasons stated below, this particular delay is likely excusable due to the strains that the pandemic has placed on organizations such as PPS to adapt to these unprecedented circumstances.

PPS took approximately eight weeks after receiving their fee to complete the review and delivery of the 4,000 pages of responsive emails. During this time, PPS has maintained contact with petitioner, providing updates on timing and fees. Given its estimate of eleven hours to complete this task, eight weeks is a protracted period of time. Notwithstanding our concern with regard to the lengthy period, it is unnecessary for us to determine whether this delay is unreasonable. We find that even if we were to make such a finding of unreasonable delay, we would impose as a penalty no more than the 50% reduction in fees that PPS has already voluntarily granted petitioner. Any greater penalty would not be supported by the totality of circumstances in this matter.

We come to the same conclusion in regard to the petitioner's request for copies of PPS contracts. PPS has explained that its response to that request was delayed by over a month<sup>4</sup> due to their Public Records Officer going on paternity leave earlier than expected. This explanation would certainly mitigate in PPS's favor in determining whether they engaged in unreasonable delay. As with the other records request, we do not need to reach any formal conclusion on the issue given that PPS has granted a 100% fee waiver. Any penalty we might have imposed would not have exceeded this voluntary waiver.

**ORDER**

For the reasons stated above, petitioner's request is DENIED.

Regards,



MIKE SCHMIDT  
District Attorney  
Multnomah County, Oregon

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<sup>4</sup> Petitioner submitted her request on August 18, 2020, with the 15 business day deadline on September 9, 2020. PPS provided the requested contract documents on October 1, 2020.