



MIKE SCHMIDT, District Attorney for Multnomah County

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April 15, 2021

Alan Kessler
1001 SE Sandy Blvd #210
Portland, OR 97214

Bridget Donegan
General Counsel
Portland City Auditor's Office
1221 S.W. Fourth Avenue, Room 310
Portland, Oregon 97204

Re: Petition of Alan Kessler seeking a fee waiver for access to IPR files relating to Portland Police Officer Brent Taylor

Dear Mr. Kessler and Ms. Donegan:

Petitioner, Alan Kessler, has asked this office to order the Independent Police Review (IPR) to grant a full fee waiver for a public records request. Petitioner had asked IPR for: "All records related to any complaint, review, investigation, or other inquiry regarding Brent M. Taylor (DPSST #51250)." After some back-and-forth not relevant to the issue at hand, IPR provided a fee estimate of \$1,407.06 to cover 22 hours of staff work necessary to complete its response to this request.

Petitioner then requested a waiver of those fees, citing the public interest in this particular officer's conduct. IPR acknowledged that there was a public interest and granted a 50 percent reduction in its fee to \$703.53. Petitioner now appeals, arguing that IPR acted unreasonably in not granting him a full fee waiver.

For the reasons discussed below, we deny the petition.

DISCUSSION

A. Fee Waiver – ORS 192.324(5)

ORS 192.324(5) provides that,

The custodian of a public record may furnish copies without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public.

The fee waiver statute sets out a two-step analysis. First, the public body must determine if access to the records would primarily benefit the general public. If yes, then the body may elect to waive its fees. *Petition of Brosseau*, MCDA PRO 17-21 (2017). The Attorney General has advised that in exercising its discretion on the second step an agency should consider "(1) the

character of the public interest in the particular disclosure, (2) the extent to which the fee impedes that public interest, and (3) the extent to which a waiver would burden the public body.” PUBLIC RECORDS AND MEETINGS MANUAL (2019) at 24.

The question in this case is not whether or not there is a public interest, IPR agrees that there is one, and we have already found a public interest in this particular set of facts. See *Petition of Kessler*, MCDA PRO 21-09 (2021) (describing the nature of interest in Ofc Taylor’s conduct). Rather, we must decide whether or not, given that public interest, IPR’s decision to reduce fees by 50 percent was unreasonable.

In reviewing an agency’s decision to deny a fee waiver, the district attorney may only determine whether or not the agency acted within the permissible bounds of discretion; we may not substitute our judgment for that of the agency. *Petition of Sarich*, MCDA PRO 19-40 (2019) (“even if [a] request is in the public interest, a public body is entitled to exercise its discretion to balance that interest against the burden on the body in fulfilling the request.”)

IPR has focused its response on the burden on IPR, pointing in particular to being understaffed to address an unprecedented increase in complaints regarding the police response to the unrest of the last year. Responding to this large records request will take IPR staff away from other work such as resolving incoming complaints. While it is certainly possible that the failure to grant a full waiver would be unreasonable as to a more targeted request, that is not the case presently before us. Given the approximately 1,500 pages of records involved, the staff currently available to IPR, and the unusual volume of work presently facing IPR, we cannot say that IPR’s decision to grant a 50 percent reduction was “unreasonable” as required by ORS 192.324(6).

ORDER

Accordingly, the petition is denied.

Very truly yours,



MIKE SCHMIDT
District Attorney
Multnomah County, Oregon