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Michael Kessler
mikepk@gmail.com [via email only]

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

Re: Petition of Michael Kessler seeking video recordings from Portland Police Bureau
Commander Art Nakamura

Dear Mr. Kessler and Ms. Johnston:

Petitioner, Michael Kessler, has asked this office to order the Portland Police Bureau (PPB) to provide him with certain video recordings from Commander Art Nakamura's cell phone. Petitioner made the following request, in relevant part, through PPB's public records process:

Please provide all video and audio recordings made by Arthur J. Nakamura between Thursday, August 27th through Sunday, August 30th. Please note that this request should include any videos recorded on personal devices while on duty. Please note, we have eye-witness accounts of this officer recording while on duty.

PPB responded that it had "performed a reasonable search" and could not locate any responsive records. Petitioner inquired further about the nature of the search and PPB declined to elaborate. This appeal ensued.

Petitioner included with his appeal an image, which appears to be a still frame from a video, showing Cmdr. Nakamura in uniform holding an iPhone in front of him in a posture that suggests he is making a recording. Petitioner also asserted a belief that the device used to make the recording was a personal cell phone.

In response to this petition, the City has offered some additional facts in its submission to this office:

First, the phone in the image which was attached to Mr. Kessler's appeal shows Commander Nakamura holding a City/PPB issued phone not a personal phone. Second, while Commander Nakamura had the phone available so that he could record video if the situation warranted it, he did not record any video or audio by phone between Thursday, August 27th through Sunday, August 30th. Additionally, the text records of the phone were also searched for any relevant

images. PPB was unable to locate audio or video from the requested time period on the phone or in the text message records.

This petition presents an issue that we have regularly addressed: a public records petitioner who wishes to test a public body's statement that it does not possess a responsive record. The City responds, correctly, that we are without legal or practical authority to resolve such a dispute. See, among others, *Petition of Alan Kessler*, MCDA PRO 18-28 (2018).

The other issue raised is whether a record on a personally owned device is subject to the public records law. As we stated in *Kessler*, the creation of a record on a personal device does not alter its status as a public record. However, this conclusion does not resolve the disagreement as to whether a personal device was involved in the first place.

PPB has stated that the device petitioner thought might be a personal cell phone was, in fact, a PPB-issued cell phone. Further, Cmdr. Nakamura has stated that he did not actually make any recordings, rather he wanted to be ready to record in the event it became necessary. Having performed a search for responsive records on Cmdr. Nakamura's phone and inquired of Cmdr. Nakamura as to the existence of recordings there or elsewhere, the City can do no more. See, *Petition of Kessler*, MCDA PRO 18-28 (2018) (public body may not compel employee to provide access to personal device to confirm non-existence of additional responsive records).

ORDER

Accordingly, the petition is denied.

Very truly yours,



MIKE SCHMIDT
District Attorney
Multnomah County, Oregon